COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2011AP400-CR
2011AP864-CR

Cir. Ct. No. 2009CM1710

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN R. JONES,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Stephen Jones appeals a judgment of conviction and an order denying his motion for postconviction relief. Jones argues his trial

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

counsel was ineffective by failing to move that a certain juror be stricken for cause, failing to use a peremptory strike against the juror, and failing to question the juror further. Jones also contends his attorney should have objected to certain questions the State asked during voir dire. We reject Jones's arguments and affirm.

BACKGROUND

¶2 A criminal complaint alleged that Michael Zuelsdorf called police and reported that his sister Lisa, Jones's wife, had been in a physical altercation with Jones and "had an injury on her lip because of it." According to Zuelsdorf, Lisa told him that Jones "came home drunk" and "pulled her out of a chair by her hair and kicked her in the face while she was lying on the ground." When officers contacted Lisa, she admitted that she and Jones had a verbal argument, but she maintained Jones did not hit her. She stated she had injured her lip when she tripped over a laundry basket earlier that day. Jones was charged with one count of misdemeanor battery and one count of disorderly conduct, both as acts of domestic abuse. He pled not guilty to both counts, and the case proceeded to a jury trial before Judge Mark McGinnis.

¶3 During voir dire, the court asked the panel of prospective jurors whether they knew or had socialized with any employees of the Outagamie County District Attorney's Office. One juror, Douglas Wunderlich, indicated that he "endorsed" and "had some dealing with [district attorney] Carrie Schneider." Judge McGinnis then pointed out that Wunderlich had allowed McGinnis to put up a campaign sign in Wunderlich's yard, to which Wunderlich added, "I think I endorsed you too." The court stated, "I remember that. Okay, and you did that for [Schneider] once or twice during her campaign?" Wunderlich answered, "Yes."

The court then asked, "Understanding that Ms. Schneider is, it's her office that's handling this case, she probably doesn't even know the trial is going on, she's got her own workload and [there are] thousands of cases she's responsible for, do you have any difficulty being fair and impartial?" Wunderlich responded, "No, I don't." Jones's attorney did not move to strike Wunderlich for cause, nor did she use a peremptory strike against him. She did not question him further about his relationships with Schneider or Judge McGinnis.

¶4 Later on during voir dire, the assistant district attorney asked the panel several questions about domestic violence. Specifically, she asked the panel whether they could "imagine a situation where a victim of domestic violence or domestic abuse does not want the police involved[.]" She also asked, "Can all of you also imagine a situation where a victim of domestic abuse may lie or tell a different story to cover for the person who caused the injury to them?" Jones's attorney did not object to these questions.

¶5 The jury convicted Jones of both counts. Jones moved for postconviction relief, arguing ineffective assistance of counsel. He contended Wunderlich was objectively biased due to his past contacts with Schneider and Judge McGinnis. He argued his trial attorney should have moved to strike Wunderlich for cause, should have used a peremptory strike against him, or should have questioned him further about the extent of the relationships. Jones also contended his attorney should have objected when the State asked improper hypothetical questions about domestic violence during voir dire. The court denied Jones's motion following a ***Machner***[2] hearing.

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

DISCUSSION

¶6 An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We do not disturb the trial court's findings of fact unless they are clearly erroneous, but we independently review whether counsel's conduct amounts to ineffective assistance. ***Id.***

¶7 To succeed on a claim of ineffective assistance of counsel, a defendant must prove that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To establish deficient performance, a defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. However, there is "a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To establish prejudice, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If a defendant fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong was satisfied. ***Id.*** at 697.

I. Juror Wunderlich

A. Motion to strike for cause

¶8 Jones first contends his trial counsel was ineffective by failing to move to strike Wunderlich for cause. Jones's argument rests on the premise that Wunderlich was objectively biased.[3] Objective bias exists when a prospective juror's "relationship to the case is such that no reasonable person in the prospective juror's position could possibly be impartial, despite the desire to set aside any bias." ***State v. Oswald***, 2000 WI App 3, ¶4, 232 Wis. 2d 103, 606 N.W.2d 238. "A juror therefore should be viewed as objectively biased if a reasonable person in the juror's position could not avoid basing his or her verdict upon considerations extraneous to evidence put before the jury at trial." ***State v. Tody***, 2009 WI 31, ¶36, 316 Wis. 2d 689, 764 N.W.2d 737.

¶9 Jones argues Wunderlich was objectively biased because "a juror that (1) has had prior dealings with the presiding judge and the county district attorney as well as (2) publicly supported these individuals, is an objectively biased juror as a matter of law." We disagree. With respect to Schneider, there is no evidence that Wunderlich's contacts with her were so extensive that a reasonable juror in his position could not have been impartial. During voir dire, Wunderlich merely acknowledged that he had "endorsed" Schneider and had "some dealing" with her in the past. He did not say that he had any sort of social or personal relationship with her. Schneider was not personally handling the case,

[3] Besides objective bias, Wisconsin recognizes two other broad categories of juror bias—statutory bias and subjective bias. *See* ***State v. Oswald***, 2000 WI App 3, ¶4, 232 Wis. 2d 103, 606 N.W.2d 238. Jones does not allege that Wunderlich was either statutorily or subjectively biased.

and Wunderlich did not state that he knew or had any relationship with the assistant district attorney representing the State. Furthermore, Wunderlich indicated that his past endorsement of Schneider would not have any effect on his ability to be impartial. A prospective juror's subjective state of mind, while not determinative, is relevant to the objective bias determination. *See* ***State v. Faucher***, 227 Wis. 2d 700, 720, 596 N.W.2d 770 (1999). A past political endorsement of Schneider, without more, is not enough to support a finding that Wunderlich was objectively biased.

¶10 Similarly, the record does not indicate that Wunderlich's relationship with Judge McGinnis made Wunderlich objectively biased. During voir dire, Wunderlich indicated that he had endorsed Judge McGinnis and allowed Judge McGinnis to put a campaign sign in Wunderlich's yard. At the postconviction hearing, Judge McGinnis stated he did not think he had ever met Wunderlich before the trial, he had never eaten a meal or socialized with him, and they were not "buddies." We see no reason why Wunderlich's limited relationship with Judge McGinnis would have led Wunderlich to "bas[e] his … verdict upon considerations extraneous to evidence put before the jury at trial." *See* ***Tody***, 316 Wis. 2d 689, ¶36.

¶11 Jones argues this case is similar to ***Faucher***, where our supreme court held that a juror was objectively biased because he had lived next door to the state's main witness for four years and knew the witness to be a "person of integrity" who "wouldn't lie." ***Faucher***, 227 Wis. 2d at 705. However, unlike the juror in ***Faucher***, Wunderlich did not have a long-term, personal relationship with Schneider or Judge McGinnis. Wunderlich never said that he believed Schneider and Judge McGinnis were particularly trustworthy or credible. Moreover, the

Faucher trial was essentially a "'credibility contest between … the [state's] sole witness and the alleged perpetrator of the crime.'" ***Id.*** at 733 (quoted source omitted). In that context, the court had good reason to worry that a juror with a preconceived opinion about a key witness's credibility would not be able to base his verdict on the evidence presented. *See* ***id.***

¶12 Jones also analogizes this case to ***State v. Lindell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223. Lindell was charged with first-degree intentional homicide in the death of Donald Harmacek. ***Id.***, ¶8. A prospective juror indicated that she had known Harmacek for twenty years and was "[c]lose friends" with him. ***Id.***, ¶42. She stated she and her parents had a long-standing business relationship with Harmacek, and she and her mother attended his funeral. ***Id.***, ¶¶43-44. The supreme court held that the juror was objectively biased, based on her close, long-term relationship with the victim and the brutal nature of the crime. ***Id.***, ¶¶41-46. Wunderlich's relationships with Schneider and Judge McGinnis were not nearly as close as the juror's relationship with the victim in ***Lindell***. Furthermore, Wunderlich was not asked to pass judgment on a person accused of brutally murdering a family friend.

¶13 Jones next argues this case is similar to ***Tody***, where our supreme court held that a prospective juror who was also the presiding judge's mother was objectively biased as a matter of law. ***Tody***, 316 Wis. 2d 689, ¶5. The court reasoned that a "judge's mother has an interest in the case, namely her familial relationship with the judge, that is extraneous to the evidence on which the jury is to base its decision." ***Id.***, ¶38. The court concluded a reasonable juror in the mother's position would not be able to set aside the familial relationship and decide the case impartially. ***Id.*** The court was also concerned that other jurors

might be unduly deferential to the mother's opinions and that her presence on the jury might make counsel "reluctant to challenge the circuit court's adverse rulings with ordinary zeal." ***Id.***, ¶39. While these concerns are certainly compelling where a close familial relationship exists between a judge and juror, we do not agree with Jones that they are equally compelling where a juror merely endorsed the judge in a political campaign.

¶14 Instead, we agree with the State that this case is more akin to ***State v. Smith***, 2006 WI 74, 291 Wis. 2d 569, 716 N.W.2d 482. There, our supreme court held that a juror who worked as an administrative assistant in the district attorney's office was not objectively biased simply because she worked for the same entity as the prosecuting attorney. ***Id.***, ¶¶2-3. The court observed that "'[a] prospective juror's knowledge of or acquaintance with a participant in the trial, without more, is insufficient grounds for disqualification.'" ***Id.***, ¶34 (quoting ***State v. Louis***, 156 Wis. 2d 470, 484, 457 N.W.2d 484 (1990)). As in ***Smith***, Wunderlich's mere acquaintance with the district attorney and presiding judge, without more, is insufficient to support a finding of objective bias.

¶15 Because Wunderlich was not objectively biased, Jones's trial counsel did not perform deficiently when she did not move to strike him for cause. "Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit." ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

B. Peremptory strike

¶16 Jones next contends his trial counsel was ineffective by failing to use a peremptory strike against Wunderlich. Again, we conclude Jones's counsel did

not perform deficiently. At the postconviction hearing, counsel testified she did not see any need to strike Wunderlich. She "didn't feel there was an issue" regarding Wunderlich's relationships with Schneider and Judge McGinnis. She stated the fact that Schneider and Judge McGinnis may have put campaign signs in Wunderlich's yard "didn't mean that … he wouldn't be able to be fair and impartial." She felt Wunderlich was telling the truth when he testified that he could be impartial, and if she thought he had lied, she would have questioned him further. Based on Wunderlich's answers, counsel could reasonably conclude that a juror in his position would be able to decide the case impartially. *See supra*, ¶¶9-10.

¶17 Furthermore, counsel testified that her strategy during voir dire was to remove jurors who had past experiences or "issues" with alcoholism and domestic violence. For instance, she struck one juror who stated that his father had been abusive when drunk. She also struck two jurors whose close family members had been domestic violence victims. Counsel's decision to use three of her peremptory strikes on jurors who had prior experiences with alcoholism and domestic violence was reasonable, given the State's theory that Jones had abused his wife while drunk.

¶18 Additionally, Jones's counsel used her fourth peremptory strike to remove a juror who knew Schneider through Girl Scouts and described her as a "family friend." It was reasonable for counsel to remove someone who described Schneider as a friend rather than Wunderlich, who merely stated that he had "endorsed" and had "some dealing" with Schneider.

C. Failure to ask further questions

¶19 Jones also argues his trial counsel should have questioned Wunderlich further about his relationships with Schneider and Judge McGinnis. We agree with the trial court that, while counsel could have asked additional questions, her failure to do so did not amount to deficient performance. As explained above, counsel reasonably concluded, based on Wunderlich's answers, that his contacts with Schneider and Judge McGinnis were minimal and would not affect his ability to decide the case impartially. Furthermore, as the trial court pointed out, "go[ing] after" a potential juror during voir dire may alienate not only that juror, but also the other members of the panel. Thus, counsel could have reasonably concluded that asking Wunderlich additional questions might do more harm than good.[4]

II. The State's voir dire questions

¶20 Jones next contends his trial counsel was ineffective by failing to object when the State asked improper hypothetical questions during voir dire. Specifically, Jones objects to the State asking whether potential jurors could "imagine a situation where a victim of domestic violence or domestic abuse does not want the police involved" or "a situation where a victim of domestic abuse may lie or tell a different story to cover for the person who caused the injury to them[.]"

[4] When assessing whether counsel's challenged acts or omissions were reasonable, we are not limited to the strategies and explanations articulated by counsel. Rather, the question is whether, under the circumstances of the case as they existed at the time of trial, the challenged conduct or failure to act could have been justified by an attorney exercising reasonable professional judgment. *See* ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838.

¶21 WISCONSIN STAT. § 805.08(1) states that examination of jurors "shall not be repetitious or based upon hypothetical questions." However, as the Trial Handbook for Wisconsin Lawyers explains, there is a fine line between direct and hypothetical questions, and it is within the trial court's discretion to decide whether to allow a particular question:

> Despite the statutory injunction against asking hypothetical questions, most courts discretionarily permit the propounding of such questions if they are relevant and reasonably calculated to lead to information that might assist counsel in making an intelligent utilization of peremptory challenges. Quite often the distinction between a direct and a hypothetical question is purely one of semantics. Thus asking whether or not one harbors a bias against large verdicts, or conversely, feels that anyone who sues an insurance company should recover something, is asking a "direct question," while asking whether or not anyone would have a reluctance to render a particular type of verdict, either large or small, could be construed as a hypothetical question. Most seasoned trial judges ignore these distinctions, provided that the information sought is meaningful.

10 TED M. WARSHAFSKY & FRANK T. CRIVELLO II, WISCONSIN PRACTICE SERIES, TRIAL HANDBOOK FOR WISCONSIN LAWYERS § 6.09, at 156-57 (3d ed. 2010).

¶22 Furthermore, in Wisconsin, control of voir dire "rests primarily with the trial court. Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. The trial court has broad discretion as to the form and number of questions to be asked." ***Hammill v. State***, 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979) (internal quotations and citations omitted). We will not disturb a trial court's decision concerning voir dire absent an erroneous exercise of discretion. ***State v. Koch***, 144 Wis. 2d 838, 847, 426 N.W.2d 586 (1988).

¶23 At the postconviction hearing, the trial court determined that the State's voir dire questions were "proper question[s] given the nature of the case [and] the theories of the case." The court stated, "[I]f an objection would have been made, it would have been overruled." We agree that this would have been a proper exercise of discretion. The State's questions did not ask the potential jurors to assume any facts as true. The questions merely explored the jurors' feelings about two different scenarios, both of which were relevant to the facts of the case. There is no meaningful difference between the questions the State asked—for instance, "[Can you] imagine a situation where a victim of domestic violence or domestic abuse does not want the police involved?"—and Jones's suggested rephrasing of those questions—for example, "Do any of you assume that no domestic abuse or domestic violence incidents go unreported?" Given the fine line between direct and hypothetical questions, we conclude it was within the trial court's discretion to allow the State's questions about domestic violence.

¶24 Had Jones's counsel objected to the State's questions, the trial court would have properly overruled her objections. Consequently, she did not perform deficiently by failing to object. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

By the Court.—Judgment and order affirmed.

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