COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP215 **Cir. Ct. No. 2007CF91**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN D. MADSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Kevin Madsen appeals an order denying his WIS. STAT. § 974.06 (2011-12), postconviction motion for a new trial. He argues: (1) the trial court improperly exercised its discretion when it failed to make further inquiry after the jury reported that a newspaper found in the jury room contained coverage of the first day of the trial; and (2) Madsen's trial counsel was ineffective

for failing to move for a mistrial or request further inquiry into possible contamination of the jury.[1] We reject these arguments and affirm the order.

¶2 Madsen was convicted of two counts of sexual assault of a child, soliciting a child for prostitution, and child enticement. The victim, K.M.P. said Madsen offered methamphetamine to his accomplice, Daniel Owens, in exchange for Owens allowing Madsen to have intercourse with her. She also alleged multiple instances of physical abuse by Owens.

¶3 On the second day of trial, the jury reported to the bailiff that a newspaper in the jury room contained coverage of the first day of the trial. The jurors removed that section of the newspaper and placed it behind the microwave oven. The jurors told the bailiff they had not read the article. The court reported the jury's message to the attorneys and Madsen's attorney did not request any form of relief or further inquiry into the matter.

¶4 By failing to request any examination of the jurors regarding the newspaper article, Madsen's counsel forfeited any right to directly review that issue. Forfeiture by counsel is binding on Madsen. *See* ***State v. Wilkens***, 159 Wis. 2d 618, 624, 465 N.W.2d 206 (Ct. App. 1990). Therefore, that review must take place under the rubric of ineffective assistance of counsel.

[1] Madsen also contends his postconviction counsel was ineffective for failing to raise these issues in Madsen's initial postconviction motion. Ineffective assistance of postconviction counsel is only relevant to the question of whether Madsen's present postconviction motion is procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Because we do not apply the ***Escalona-Naranjo*** bar in this case, we need not review the claim of ineffective assistance of postconviction counsel.

¶5 Furthermore, the circuit court was not required to sua sponte make further inquiry into the matter. From the jury's extensive examination about pretrial publicity before the trial began, its removal of that section of the newspaper, and its act of informing the bailiff of the newspaper's presence, the jury obviously knew consideration of the article was not appropriate. There is no reason to doubt the jury's assertion to the bailiff that no jurors read the article.

¶6 The article merely factually reported on the first day of the trial. The jury was present for most of the activities described in the article. The article devoted one sentence to the fact that the court heard pretrial motions. It did not identify which party made the motions, the nature of the motions, or how they were decided. There is no basis for believing the mere knowledge that pretrial motions were heard prejudiced Madsen.

¶7 Madsen contends the newspaper contained an unflattering photograph of him. He contends the photograph might cause a juror to think he looked guilty. He does not specify anything about the photograph that would lead anyone to think he looked like the kind of person who would commit these offenses. In addition, the jury was instructed not to be swayed by prejudice or passion. That jury instruction presumptively cured any prejudice that might have arisen from the photograph. *See* ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399.

¶8 Madsen also contends the article's characterization of him and Owen as "friends" implied that all of the physical and mental abuse Owens inflicted on K.M.P. was, in some form, encouraged or condoned by Madsen. The evidence presented at trial made clear that the victim's injuries were inflicted solely by Owens. She expressly confirmed that Madsen had not physically injured her.

There is no evidence that Madsen encouraged or condoned the physical abuse or that he was present when it occurred. Under these circumstances, the court was not required to make further inquiry into the possibility of jury contamination based on the newspaper article.

¶9 For the reasons discussed above, Madsen's claims of ineffective assistance of trial counsel fail. To establish ineffective assistance of counsel, Madsen must show both deficient performance and prejudice to his defense. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). He must show actual prejudice and may not rely on speculation that the result of the trial might have been affected by counsel's error. *See* ***Stark v. Erickson***, 227 Wis. 2d 758, 773-74, 596 N.W.2d 749 (1999). Madsen's claim of prejudice to his defense is entirely speculative. Because the presence of the newspaper in the jury room had no conceivable influence on the verdicts, Madsen has not established any prejudice from his trial counsel's failure to move for a mistrial or request further inquiry.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).