

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 2014

Diane M. Fremgen
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. 2013AP1904-CR

Cir. Ct. No. 2011CF4891

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYLO LAMONT WARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and STEPHANIE ROTHSTEIN, Judges. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Tylo Lamont Ward appeals a judgment of conviction entered after a jury found him guilty of one count of first-degree sexual assault of a child. He also appeals an order denying his postconviction motion

without a hearing.¹ He claims that the trial court erred by refusing to discharge a juror who allegedly slept during the trial. He further claims that his trial counsel was ineffective for failing to pursue the issue, either by requesting that the allegedly inattentive juror serve as the alternate or by otherwise seeking to prevent the juror from deliberating. Because the trial court found that the evidence did not support a conclusion that a juror was sleeping, and because Ward failed to present sufficient allegations in his postconviction motion to earn an evidentiary hearing on his claim that trial counsel was ineffective, we affirm.

BACKGROUND

¶2 The State charged Ward with two counts of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02 (2009-10).² Ward denied the allegations, and the matters proceeded to trial.

¶3 After the trial court dismissed the jurors for lunch on the second and final day of trial, the State raised the question of whether a juror had been sleeping:

[THE STATE]: Judge, we—obviously we have 13 people. I don't pay attention to jurors but Officer Lehmann [the State's designated court officer pursuant to WIS. STAT.

¹ Judge Ellen R. Brostrom presided over the trial and entered the judgment of conviction in this matter. Judge Stephanie Rothstein presided over the postconviction proceedings and entered the order denying postconviction relief. To distinguish between these two circuit courts, we refer to Judge Brostrom as the trial court and to Judge Rothstein as the postconviction court.

² The State alleged that Ward twice committed first-degree sexual assault of a child during the period from March 17, 2009, through April 10, 2010. The State also charged Ward with one count of repeated sexual assault of a child, but the trial court dismissed that charge on the State's motion after jury selection. All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

§ 906.15(2)(b)] said that one of the jurors, number 12, has had a very difficult time staying awake during this trial.

THE COURT: Is the [sic] blond individual with glasses?

OFFICER LEHMANN: No, he was the African American male in the front row. He slept for most of the testimony up until [the fifth witness] when the bailiff woke him up.

THE COURT: Okay. I didn't notice that either.

[THE STATE]: So if that's happened and bailiff had to wake him up my sort of view right now he may have missed stuff. We have 13 and we may have a need to require [juror number twelve] to be the alternate.... [W]e can't have a person sleeping and missing testimony and Officer Lehmann told me she did observe that....

THE COURT: The reason I asked about the blond individual he was a little sleepy during instructions yesterday but I have watched him throughout the day. He has been paying attention today so—but I did not notice the other individual. [Defense counsel,] any opinion about that?

[DEFENSE COUNSEL] Well, I didn't see it. I'm reluctant to agree to anything based on information I'm not aware of. I haven't seen him directly sleeping.

[THE STATE]: The bailiff's here. Did the bailiff have to wake him up?

THE DEPUTY: Yes.

[DEFENSE COUNSEL]: I'm not going to take a position because—

THE COURT: —I would be inclined, I think, to do that. If someone isn't paying attention and is missing the evidence I think it makes them less qualified to deliberate than those jurors who have been paying attention. Let me ask, Deputy, in what manner did you wake him?

THE DEPUTY: Just tapped him on the leg.

THE COURT: Tapped him on the leg?

THE DEPUTY: Yes.

THE COURT: When you did so what was his reaction?

THE DEPUTY: He opened his eyes.

THE COURT: Did it appear in fact he was asleep?

THE DEPUTY: Possibly he was dozing. I did not observe him sleeping during the testimony of the little girl.

THE COURT: It's also possible he's an individual who concentrates with his eyes closed. Were there other signs that he was in fact asleep other than his eyes being closed?

THE DEPUTY: No.

THE COURT: When you tapped him on the leg did he start, I mean?

THE DEPUTY: No.

THE COURT: He did not?

THE DEPUTY: No.

THE COURT: Okay. Hard to say. Why don't we keep an eye on him this afternoon. I'll make a decision.

[THE STATE]: That's fair.

¶4 Later that afternoon, the trial court selected a female juror by lot as the alternate and discharged her. After the remaining jurors—including juror number twelve—retired to deliberate, the circuit court explained:

THE COURT: I forgot to put on the record prior to the jury coming back down, but I am sure it was evident, I decided not to choose the African American gentleman as our alternate. I watched him throughout the afternoon, he was awake. He did have periods of time where he had his eyes closed, but it didn't appear he was asleep. I thought the information from the deputy was ambiguous enough about whether he had actually been asleep that I wasn't comfortable choosing him as the alternative. Any response to that by either party?

[THE STATE]: No.

[DEFENSE COUNSEL]: No.

¶5 The jury found Ward guilty of one count of sexual assault of a child and not guilty of the other count. The trial court imposed a thirty-two year term of imprisonment.

¶6 Ward filed a postconviction motion, alleging both that the trial court erred by failing to choose juror number twelve as the alternate juror and that his trial counsel was ineffective for failing to pursue the issue of the allegedly sleeping juror. Upon reviewing the record, however, the postconviction court determined that “the matter was adequately brought to [the trial court’s] attention” and that the trial court’s inquiry and findings were sufficient to support the decision to keep juror number twelve on the jury panel. Based on those conclusions, the postconviction court denied Ward’s motion without an evidentiary hearing, and he appeals.

DISCUSSION

¶7 Ward first contends that the trial court erred when it did not designate juror number twelve as the alternate juror. Ward is not entitled to a review of that issue. Generally, a party must raise a contemporaneous objection at trial to preserve an issue for appellate review. *See State v. Davis*, 199 Wis. 2d 513, 517-18, 545 N.W.2d 244 (Ct. App. 1996). Here, Ward’s trial counsel first told the trial court that the defense was “reluctant” to agree to the State’s request to exclude juror number twelve from the panel that ultimately considered the charges against Ward. Trial counsel next said that the defense “took no position” on the matter. We are satisfied that Ward did not ask at trial for the relief that he now claims should have been granted, and therefore he is not entitled to appellate review of the issue. Accordingly, we will consider his claim only within the rubric

of ineffective assistance of counsel. See *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

¶8 A defendant who claims that trial counsel was ineffective must prove both that trial counsel’s performance was deficient and that the deficiency prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether counsel’s performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶9 To demonstrate deficient performance, the defendant must show that counsel’s actions or omissions “fell below an objective standard of reasonableness.” See *Strickland*, 466 U.S. at 688. To demonstrate prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. *Id.* at 697.

¶10 A postconviction motion warrants a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents an additional question of law for our independent review. *Id.* If, however, the petitioner does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the petitioner is not entitled to relief, the postconviction court has discretion to deny a postconviction motion without a hearing. *Id.* We review a lower court’s discretionary decisions with deference. *Id.*

¶11 Here, Ward maintains that his trial counsel afforded him ineffective assistance by failing to request that juror number twelve be designated the alternate juror. The postconviction court properly denied the claim without a hearing because the record conclusively shows that Ward is not entitled to relief.

¶12 A defendant who seeks relief on the ground that a juror was sleeping during the trial must first prevail in a two-step inquiry: “[f]irst, the circuit court must determine, as a question of fact ... whether the juror was sleeping. Second, if the circuit court finds that the juror was in fact sufficiently inattentive, the court must determine whether the defendant suffered prejudice as a result[.]” *See State v. Novy*, 2013 WI 23, ¶47, 346 Wis. 2d 289, 827 N.W.2d 610 (citation omitted). Here, however, as the postconviction court recognized, the trial court resolved the first prong of the analysis against Ward while the trial was underway. Specifically, the trial court found that the evidence did not support a conclusion that juror number twelve slept during trial.

¶13 We must uphold a trial court’s factual findings regarding the conduct and attentiveness of the jurors unless those findings are clearly erroneous. *See id.*, ¶48. The trial court’s findings here are not clearly erroneous. The trial court considered the observations made of juror number twelve by other people in the courtroom, and the trial court subsequently made its own observations that juror number twelve closed his eyes at times during the trial but did not appear to be asleep. Therefore, the record conclusively shows that Ward is not entitled to relief on the basis that a juror was asleep during the trial proceedings.

¶14 Moreover, Ward’s postconviction motion did not merit a hearing for a second and equally sufficient reason. Ward failed to allege sufficient material facts that, if true, warrant relief. *See Allen*, 274 Wis. 2d 568, ¶9.

¶15 “A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.” *State v. Prescott*, 2012 WI App 136, ¶11, 345 Wis. 2d 313, 825 N.W.2d 515 (citations omitted). To earn a postconviction hearing based on any such claims of inaction, a defendant must allege “the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *See Allen*, 274 Wis. 2d 568, ¶23.

¶16 Ward’s postconviction motion failed to satisfy the *Allen* standard. Although Ward contends that his trial counsel should have sought to question juror number twelve, he does not show what the juror would have answered or how the answers would have aided him. Ward further indicates that trial counsel should have questioned Lehmann, but Ward does not demonstrate how Lehmann’s answers would have differed from or added to the information Lehmann provided on the record during the trial proceedings. Because the trial court considered information from Lehmann before declining to find that juror number twelve was sleeping, some showing that Lehmann would have provided additional information is necessary to demonstrate that trial counsel’s failure to question Lehmann further was deficient and prejudicial.

¶17 Ward also submitted his own affidavit in support of his claims for a new trial. In that affidavit, he avers that he saw a juror sleeping during trial. This avowal does not support his claim that trial counsel was ineffective. If Ward observed a sleeping juror, he should have promptly disclosed that observation to his lawyer during the trial. He fails to show that he made such a disclosure. He cannot complain now that trial counsel lacked information about Ward’s own observations during the trial proceedings. *See State v. Jones*, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390 (trial counsel not ineffective for failing to

discover information that defendant could have revealed during trial). Similarly unavailing is Ward's avowal that, after the trial court selected a juror other than juror number twelve as the alternate, Ward "asked [his] attorney if he could do anything to oppose this." Ward's vague inquiry to his lawyer does not demonstrate that his trial counsel erred in any way. Certainly, such an inquiry does not show that trial counsel should have taken some particular action or that any unspecified action would have affected the outcome of the trial.³

¶18 Finally, Ward complains that his trial counsel did not move for a mistrial. Nothing in the record demonstrates that such a motion would have been successful. The trial court declined to designate juror number twelve as the alternate because, as the trial court explained, the evidence was too ambiguous to support a finding that the juror was sleeping. In light of that ruling, Ward fails to show that the trial court would have granted the more drastic remedy of a mistrial. *See State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998) (the law prefers less drastic alternative to mistrial). For all of the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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

³ To the extent Ward implies that his trial counsel had an obligation to seek removal of a juror if Ward expressed an interest in doing so, he is wrong. The decision to seek removal of a juror is not among the few exceptions to the rule that matters of trial strategy rest with counsel, not the defendant. *See State v. Brunette*, 220 Wis. 2d 431, 443-44, 583 N.W.2d 174 (Ct. App. 1998).

