COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2676 **Cir. Ct. No. 2001CF5750**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONNIE L. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 PER CURIAM. Lonnie L. Jackson appeals from an order summarily denying his motion for postconviction relief. We conclude that Jackson is not entitled to an evidentiary hearing on the only claim that is not procedurally barred—his ineffective assistance claim against postconviction

counsel—because the trial court properly exercised its discretion in summarily denying his motion after it determined that his allegations were either wholly conclusory or conclusively refuted by the record. Therefore, we affirm.

¶2 A jury found Jackson guilty of four first-degree sexual assaults of the then nine-year-old daughter of his live-in girlfriend, and acquitted him of one count of sexual assault of another nine-year-old girl. The trial court imposed concurrent sentences of fifteen, fifteen, forty and forty-five years. This court affirmed the judgment on direct appeal. *See* ***State v. Jackson***, No. 2004AP1536-CR, unpublished slip op. ¶24 (WI App Aug. 16, 2005).

¶3 Jackson moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2005-06), raising numerous issues including the ineffective assistance of trial and postconviction counsel.[1] The trial court summarily denied the motion, reviewing the sufficiency of Jackson's allegations against postconviction counsel pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).[2] Jackson appeals from the summary denial of his postconviction motion.

¶4 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] A defendant must allege a "sufficient reason" for failing to raise, by prior postconviction motion or on direct appeal, the issues he or she later seeks to raise in a postconviction motion pursuant to WIS. STAT. § 974.06(4). ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), extends the application of the procedural bar of § 974.06(4) from successive postconviction motions to those that follow a direct appeal.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

> As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the ***Bentley*** standard allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.

Id., ¶23 (footnote omitted). "We require the [trial] court 'to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion.' ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same)."

Id., ¶9.

¶5 In addition to meeting the ***Allen*** requisites, Jackson must also meet the requisites to maintain an ineffective assistance claim because that is the only context pursuant to which his postconviction issues are properly before us. To demonstrate ineffective assistance, the defendant must show that counsel's

performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "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. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶6 Jackson alleges that he did not raise these issues on direct appeal because his postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness. We conclude that Jackson's allegation of postconviction counsel's ineffectiveness constitutes a sufficient reason to overcome the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). *See* ***State v. Robinson***, 177 Wis. 2d 46, 52-53, 501 N.W.2d 831 (Ct. App. 1993). We therefore review Jackson's ineffective assistance claims against postconviction counsel for failing to pursue trial counsel's ineffectiveness for failing to: (1) investigate the facts, witnesses and an alleged alibi defense, and by failing to seek a continuance to conduct a belated investigation to prepare for trial; (2) challenge the amendment of the information alleging multiplicitous and overly broad and vague charges; (3) waive a jury trial and insist on a bench trial; (4) "reaffirm the objection" to the admissibility of videotaped excerpts at trial, which included other acts evidence; (5) move to dismiss the charges for

insufficient evidence including the lack of evidence of Jackson's intent; (6) object to improper jury instructions; and (7) challenge the excessiveness of Jackson's sentence.[3]

¶7 Jackson alleges that his trial counsel was ineffective for failing to investigate the facts and witnesses necessary to properly prepare his defense.[4] His allegations do not meet the specificity requirements necessary to mandate an evidentiary hearing, particularly in the context of ineffective assistance where prejudice must be "*affirmatively* prove[n]." ***Wirts***, 176 Wis. 2d at 187 (emphasis in ***Wirts***); *see* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) ("Moreover, '[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the [proceeding].'") (citation omitted; first alteration by ***Flynn***); *see also* ***Strickland***, 466 U.S. at 694. Insofar as Jackson contends that his trial counsel should have moved for a continuance to investigate these matters, Jackson has not alleged with particularity the identity of these potential witnesses or the substance of their proposed testimony. Jackson's failure to satisfy the ***Flynn*** requisites on his failure to investigate allegations also negates his entitlement to an evidentiary hearing on his

[3] We address the issues Jackson raised, however we re-organized and combined some of them to avoid undue repetition. In his appellate brief, Jackson belatedly raises other issues, however, those issues were not raised in his postconviction motion or decided by the trial court and thus, were not preserved for appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52 (generally, an appellate court will not review an issue raised for the first time on appeal). We decline to deviate from that general rule.

[4] To overcome ***Escalona***'s procedural bar, Jackson is actually criticizing postconviction counsel for failing to previously raise trial counsel's alleged ineffectiveness. For brevity's sake, we refer to the ineffective assistance allegations as against trial counsel.

continuance allegations because he has not alleged sufficient material facts to demonstrate that a continuance would have been reasonably probable to have changed the outcome. *See* ***Strickland***, 466 U.S. at 694. Consequently, Jackson's allegations relating to his counsel's alleged failure to investigate and seek a continuance are wholly conclusory and do not warrant an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9; ***Flynn***, 190 Wis. 2d at 48.

¶8 Jackson also alleges that his trial counsel should have moved to dismiss the amended charges as multiplicitous, overly broad and vague, claiming that there were no differences among several of the charges. He misunderstands, however, that the difference was factual; each charged offense occurred at a different time. Each contact constituted a separate and distinct sexual assault. Jackson's multiplicity allegations are conclusively belied by the record because each charged assault allegedly occurred at a different time. His claim that the charges are overly broad and vague also does not warrant an evidentiary hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) because Jackson had fair notice of the charges he was compelled to defend against.[5] *See* ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988) (citations and text omitted) ("[w]here the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged. Time is not of the essence in sexual assault cases … [and they] do not require proof of an exact date."). Trial counsel did not perform deficiently by failing to raise nonmeritorious objections to the amended information. *See* ***State v.***

[5] An evidentiary hearing to determine trial counsel's effectiveness is known as a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Harvey, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (counsel is not obliged to file nonmeritorious motions to avoid an ineffective assistance claim).

¶9 Jackson claims that he repeatedly told his trial counsel that he wanted a bench trial, not a jury trial. The trial court claimed it was unaware of his alleged request. Jackson is entitled to a jury trial, not a bench trial. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. Consequently, Jackson must show that he timely told his trial counsel that he did not want a jury trial, that trial counsel did not have a strategic objective in not timely informing the trial court of Jackson's request, and that had Jackson not had a jury trial it was reasonably probable that the outcome would have been different. *See* ***Strickland***, 466 U.S. at 690-94; ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983) (strategic decisions that are reasonable do not constitute ineffective assistance). Therefore, even if Jackson had timely told his trial counsel that he did not want his case tried to a jury, he has not shown how he was prejudiced by a jury trial. *See* ***id.*** Without showing prejudice, he cannot prevail on an ineffective assistance claim. *See* ***Moats***, 156 Wis. 2d at 101.

¶10 Jackson claims that his trial counsel was ineffective for failing to "reaffirm the objection" to the admissibility of excerpts of the videotape and other acts evidence at trial. We evaluate this strictly as an ineffective assistance claim because that is the only basis on which this issue is properly before us. *See* ***Escalona***, 185 Wis. 2d at 181-82. This claim requires Jackson to show that trial counsel's failure to "reaffirm the objection" constitutes ineffective assistance since Jackson concedes that his trial counsel objected; he criticizes trial counsel for not "reaffirm[ing] the objection." Jackson has not shown prejudice, namely, that had trial counsel repeated his objection it is reasonably probable that the trial court would have reconsidered its rulings.

¶11 Trial counsel objected to the videotape's admissibility on foundational and substantive grounds. Jackson's trial counsel repeatedly objected to the tape's admissibility, however, the trial court explained at each juncture why it was denying his objections. Jackson also complains about the admissibility of other acts evidence incident to the videotape evidence. At one point, the trial court responded to trial counsel's objection to a particular excerpt of the videotape where there was footage of some neighbor girls playing outside. The State claimed that that particular footage was shown to establish that Jackson was the videographer; trial counsel objected, contending that that thirty-eight-second excerpt of girls playing, implicitly suggested that Jackson was interested in videotaping the neighbor girls. The trial court, acknowledging that excerpt was irrelevant and prejudicial, and offering to give the jury a limiting instruction, explained, however, that a limiting instruction directed to that particular segment, would highlight the irrelevant and prejudicial evidence to the jury. The trial court also denied trial counsel's motion for a mistrial, explaining that the prejudicial excerpt was insufficient to warrant a mistrial. Trial counsel preserved his objection, and the prosecutor agreed not to comment or ask witnesses to comment on that segment, shown as part of the entire videotape.

¶12 This example demonstrates that the trial court was aware of the problematic nature of the videotape evidence, but when pressed, declined to reconsider its ruling. Jackson's allegations of ineffective assistance for trial counsel's failure to "reaffirm the objection" in the context of the trial court's principally discretionary determinations are insufficient to raise an issue of

deficient performance or prejudice to warrant a ***Machner*** hearing.[6] *See* ***Machner***, 92 Wis. 2d at 804.

¶13 Jackson also challenges the sufficiency of the evidence. We rejected that issue on its merits in Jackson's direct appeal. *See* ***Jackson***, No. 2004AP1536-CR, unpublished slip op. ¶¶20-24.

¶14 Jackson also contends that the trial court submitted erroneous instructions to the jury by "allow[ing] the jury to pick any date or time as it saw fit." The trial court instructed the jury on a range of dates when the claimed assaults occurred, as opposed to specific dates. The prosecutor explained however, that the time and date of the charged offenses need not be precisely specified. *See* ***Fawcett***, 145 Wis. 2d at 250. Defense counsel emphasized to the jury in closing argument that the State offered a broad time frame regarding Jackson's alleged commission of these offenses. He brought the lack of a precise date to the jury's attention; he was not ineffective.

¶15 Jackson's final complaint is that counsel was ineffective for failing to challenge his allegedly excessive sentence by postconviction motion in that "the trial court abuse[d] it's [sic] discretion by not following the sentencing guidelines, and … the defendant [was] punished for the argument with the trial judge." This conclusory allegation, challenging a discretionary sentencing decision, does not show that Jackson's sentence was excessive, and is insufficient to warrant a ***Machner*** hearing.

[6] Although this issue was not expressly raised on direct appeal, we referred to and described the videotape evidence incident to our discussion of other issues, such as the sufficiency of the evidence. *See* ***State v. Jackson***, No. 2004AP1536-CR, unpublished slip op. ¶¶20, 22-23 (WI App Aug. 16, 2005).

¶16 Jackson has alleged a multitude of issues. We only consider those properly preserved issues raised in his postconviction motion and pursued on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52. Of those properly preserved issues, only those alleged as postconviction counsel's ineffectiveness are properly before us. *See* ***Escalona***, 185 Wis. 2d at 181-82. Jackson's allegations fail as merely conclusory, or as conclusively demonstrated by the record are not viable claims for relief. We therefore affirm the denial of the trial court's order summarily denying Jackson's postconviction motion.

By the Court.—Order affirmed.

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