COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP830 **Cir. Ct. No. 2003CF35**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. HIPLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

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

¶1 PER CURIAM. Joseph Hipler appeals an order denying his motion for postconviction relief. He argues he is entitled to an evidentiary hearing on his postconviction motion alleging he received ineffective assistance of counsel. We disagree and affirm.

Background

¶2 This case arises from Hipler's conviction for the false imprisonment and sexual assault of Kelly N. with a dangerous weapon. During a two-day jury trial, Kelly testified to the following facts. While she was visiting Hipler's apartment, she saw a gallon-size bag of what appeared to be cocaine. After she saw the bag, Hipler became angry with her and prevented her from leaving. Hipler forced her to remain with him the rest of the day, both in his apartment and when he visited friends and attended a party. While accompanying Hipler against her will to one of his friend's apartments, Kelly observed a razor blade and powdery residue on a school book.

¶3 Later that evening when Kelly attempted to return to her own apartment, Hipler grabbed her by the hair and forced her back into his apartment. She did not remember the sequence of events, but "[Hipler] was on top of me trying to get my pants off, and the next thing that I remembered we were in his bedroom and he had a gun to my head and I was fighting against him." Hipler then put the gun down, pinned her arms above her head and raped her.

¶4 Kelly did not immediately report the assault. She was afraid Hipler would retaliate against either her or her friends and family. She told her father about a week later, and he reported it to the police.

¶5 Lesley Charlton, a psychotherapist who works with victims of sexual assault, testified that it is not uncommon for victims of sexual assault to delay reporting assaults. She explained that the anxiety, depression, and shock that rape victims feel can affect their decision to report the crime.

¶6 Hipler argued he should be permitted to present his own expert, Holinda Wakefield. Wakefield would testify that it is not uncommon for individuals to falsely claim to have been raped. The circuit court barred the testimony, observing Wakefield would not contradict Charlton's testimony that sexual assault victims do not always immediately report being raped. The court concluded Wakefield's observation that some claims of sexual assault are false is within the common knowledge of lay jurors. It further observed that both Charleton's and Wakefield's testimony had more to do with Kelly's credibility than with issues that require expert testimony. The judge opined that had he known Kelly was going to testify she delayed reporting the rape out of fear, he would not have found Charlton's testimony relevant.

¶7 Hipler appealed, arguing, among other things, that the trial court erred by admitting Kelly's testimony that she saw cocaine and Charlton's testimony about the reasons sexual assault victims may delay reporting the crime. He also argued he received ineffective assistance because his trial counsel did not request a curative instruction after the trial court questioned the relevance of Charlton's testimony. We disagreed and affirmed the judgment of conviction in an unpublished opinion. ***State v. Hipler***, No. 2004AP1331-CR, unpublished slip op. (WI App Oct. 26, 2006). Hipler then filed a motion alleging ineffective assistance of his postconviction counsel, which the trial court denied without an evidentiary hearing. This appeal follows.

Discussion

¶8 Whether a defendant is entitled to an evidentiary hearing on a motion for postconviction relief presents a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first determine

whether a motion "alleges sufficient material facts that, if true, would entitle the defendant to relief." ***Id.*** This is a question of law that we review independently. ***Id.*** A motion for postconviction relief must "include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" ***Id.***, ¶21. Conclusory allegations are not sufficient. ***Id.***, ¶15 (citing ***State v. Bentley***, 201 Wis. 2d 303, 316-18, 548 N.W.2d 50 (1996)). If the motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," we defer to the circuit court's discretion. ***Id.***, ¶9.

¶9 Hipler argues he is entitled to an evidentiary hearing because his postconviction counsel did not argue his trial counsel was ineffective for failing to make certain arguments. Hipler contends his postconviction counsel denied him effective assistance of counsel by not arguing his trial counsel was ineffective for: (1) failing to argue that excluding Wakefield's testimony denied him his constitutional right to present witnesses and a defense, and (2) neglecting to request a limiting instruction on Kelly's testimony regarding Hipler's cocaine.

¶10 We utilize "a two-part test for ineffective assistance of counsel claims." ***Allen***, 274 Wis. 2d 568, ¶26. The first part of the test requires the defendant to prove his or her attorney's performance was deficient. An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). Our review of an attorney's performance is highly deferential. ***Strickland***, 466 U.S. at 689; *see also* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Therefore, a defendant must "overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. The

second part of the test requires the defendant to prove the deficient performance was prejudicial. ***Allen***, 274 Wis. 2d 568, ¶26. An attorney's deficient performance is prejudicial when there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***Id.*** (citation omitted).

1. Exclusion of Wakefield's Testimony

¶11 Although a defendant has a constitutional right to present a defense, there is no constitutional right to present irrelevant evidence. ***State v. Walker***, 154 Wis. 2d 158, 192, 453 N.W.2d 127 (1990). We agree with the circuit court that testimony that some claims of sexual assault are false would "state the obvious" and dress up the inference that Kelly might have lied as having "more weight simply because [Wakefield] is a supposed expert." Wakefield's testimony would not have been relevant. Hipler's postconviction counsel cannot have performed deficiently for failing to argue his trial counsel erred by not objecting to the exclusion of evidence he had no right to present. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments).

¶12 Further, Hipler's postconviction counsel did address the relevance of both Wakefield's and Charlton's testimony. Rather than arguing Hipler had a right to counter Charlton's testimony by eliciting testimony from Wakefield—as Hipler does now—his postconviction counsel challenged the court's failure to

instruct the jury to disregard Charlton's testimony. This was a reasonable strategy in light of the trial court's discussion of Charlton's testimony.[1]

2. Evidence of Cocaine

¶13 Hipler's allegation that his postconviction counsel should have argued his trial counsel was ineffective for failing to seek a limiting instruction on the evidence of cocaine is also flawed. Hipler first argued the cocaine was inadmissible "other acts" evidence, which was irrelevant and prejudicial. We disagreed, concluding it was properly admitted to prove motive, intent, and context. ***Hipler***, unpublished slip op., *supra*, ¶16. Hipler now argues his postconviction counsel should have argued his trial counsel denied him effective assistance of counsel for failing to request a limiting instruction.

¶14 Failure to request a limiting instruction does not itself constitute ineffective assistance. "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." WIS. STAT. § 901.06 (2005-06). Implicit in the notion that an instruction shall be given when requested is the recognition that an attorney is not obligated to seek a limiting instruction whenever evidence is admitted for one purpose, but not another.

[1] Because we conclude Hipler fails to raise sufficient material facts that, if true, would show his postconviction attorney's performance was deficient, we need not address the prejudice prong of the test for ineffective assistance of counsel. We note, however, that Hipler fails to offer anything but conclusory allegations that excluding Wakefield's testimony "tipped [the balance] in favor of the prosecution."

¶15 Simply stating that his trial counsel failed to request a limiting instruction does not state sufficient material facts that, if true, would entitle Hipler to relief. More is required. To succeed, Hipler must state why, under the facts of this case, it was deficient for his trial counsel to not request a limiting instruction, and why, within the context of the issues his postconviction counsel did raise on appeal, his postconviction counsel denied him effective assistance of counsel. He does neither. Rather, he simply alleges his trial counsel "failed to provide Hipler with the protection he needed against the jury's misuse of evidence concerning his cocaine trafficking." He explains neither why this amounts to ineffective assistance of trial counsel nor how this implicates the counsel his postconviction attorney provided him.[2] It was therefore within the circuit court's discretion to deny his motion for postconviction relief without an evidentiary hearing.

By the Court.—Order affirmed.

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

[2] As noted above, because Hipler failed to state sufficient material facts that, if true, would entitle him to relief, we need not address whether there was prejudice from his attorney's conduct. We observe, however, that Hipler's arguments with respect to this prong are only conclusory allegations. Hipler states: "Prejudice from counsel's deficient performance is evident," and "[t]he waiver of a critical appellate issue is plainly prejudicial." Conclusory allegations are not sufficient to show prejudice. Rather, the defendant must explain why there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.