COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2814-CR **Cir. Ct. No. 2006CF4192**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES RICHARD CRAWFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. James Richard Crawford appeals from a judgment of conviction, entered upon a jury's verdict, on one count of using a computer to facilitate a child sex act. Crawford also appeals from an order denying without a hearing his postconviction motion, which alleged ineffective assistance of trial

counsel. We agree with the circuit court that the motion is insufficient to show that Crawford is entitled to relief, so we affirm.

BACKGROUND

¶2 Crawford was originally charged on August 14, 2006. The complaint alleged chat room/internet communications between Crawford and a police detective who Crawford believed to be a fifteen-year-old-girl. Crawford was arrested when he appeared at a location to meet the "girl." Crawford admitted to detectives that he intended to pursue sexual contact with the person, and that he expected her to be under age eighteen.

¶3 Crawford entered a guilty plea in April 2007. He was sentenced in June 2007 to two years' initial confinement and five years' extended supervision. Crawford subsequently moved to withdraw his plea when appellate counsel learned that trial counsel had misinformed Crawford about the issues he would be able to raise after pleading. Specifically, Crawford had misgivings about the manner in which police conducted their investigation, believing he was entrapped. The State stipulated to the plea withdrawal, and the circuit court allowed the withdrawal.

¶4 Crawford chose the second time to have a jury trial, which was held in November 2009.[1] The jury convicted him. At sentencing, the State recommended the same seven-year sentence that had been given previously. Defense counsel argued for a sentence that would allow Crawford to be released to

[1] The Honorable Jeffrey A. Wagner presided over the plea and the original sentencing. The Honorable Jeffrey A. Conen presided over the jury trial and the second sentencing.

supervision. Ultimately, the court sentenced him to the statutory presumptive minimum of five years' initial confinement, *see* WIS. STAT. § 939.617(1) (2005-06), with five years' extended supervision.

¶5 In October 2010, Crawford moved for postconviction relief, alleging he received an unjust sentence because of ineffective assistance of trial counsel at sentencing. Crawford leveled multiple allegations against counsel, which the circuit court distilled to four main points. Thus, as relevant to this appeal, Crawford contended that trial counsel failed to: (1) apprise Crawford that an entrapment defense was not viable; (2) ensure that the circuit court received sufficient information at sentencing; (3) properly prepare Crawford for sentencing; and (4) call witnesses to show Crawford's good behavior during periods of release.

¶6 The circuit court denied the motion without a hearing. It noted that it had actually complimented trial counsel on the presentation of his entrapment argument, even if the jury had not accepted it. It explained that it was not clear what other information trial counsel thought counsel should have presented to be sufficient. The circuit court further noted that counsel could not have anticipated the circuit court's sentencing concerns, so counsel was not ineffective for failing to divine those questions. Finally, the circuit court explained that Crawford's additional witnesses would not have made a difference: the motion was vague and what was alleged was either insufficient or cumulative. Crawford appeals.

DISCUSSION

¶7 A motion claiming ineffective assistance of trial counsel does not automatically entitle a defendant to an evidentiary hearing. *See* ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. Rather, the motion

must allege sufficient facts which, if true, entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not raise sufficient facts or presents only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief, the circuit court may deny a hearing in its discretion. ***Id.*** The question of whether the motion is sufficient on its face is a question of law, but we review the circuit court's discretionary acts for an erroneous exercise of that discretion. ***Id.***

¶8 To prevail on an ineffective-assistance-of-counsel claim, the defendant must show both that his attorney performed deficiently and that the performance was prejudicial. *See* ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. To demonstrate prejudice, "the 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.***, ¶20 (quoting ***Strickland v. Washington*** 466 U.S. 668, 694 (1984)). A "reasonable probability" is one sufficient to undermine our confidence in the outcome. ***Thiel***, 264 Wis. 2d 571, ¶20. We do, however, take care to avoid the "distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. Here, we conclude that even if Crawford has sufficiently alleged deficient performance, he has not alleged sufficient facts to demonstrate prejudice.

I. Taking the "no-win" case to trial.

¶9 Crawford complained that trial counsel never should have taken his case to trial, asserting counsel should have known there would be no basis for an

entrapment defense.[2] On appeal, Crawford asserts that the circuit court "punished [him] more severely because he had 'rolled the dice' by going to trial."

¶10 The circuit court noted that it believed trial counsel had done a good job presenting the entrapment defense, and so commented during sentencing. It also commented that the jury's rejection of the argument did not mean that trial counsel was ineffective. The circuit court further explained that there was no prejudice from going to trial, disavowing any notion that it held the fact of trial against Crawford. Neither the postconviction motion nor the appellate brief offers any reason for us to conclude otherwise.[3]

II. "Sufficient Information."

¶11 At sentencing, the circuit court noted that it could not give Crawford credit for taking responsibility for a plea. While stressing it was not penalizing Crawford for exercising his right to trial, the circuit court simply observed that the mitigating factor of a plea no longer existed. Crawford thus complains that trial counsel failed to present sufficient information about the reasons Crawford went to trial. More specifically, Crawford believed that the detective investigating this case had been out to get him for several years. Thus, Crawford alleges that trial counsel failed to present sufficient information to the circuit court of Crawford's

[2] The point of this argument is unclear, as Crawford only sought resentencing, not a new trial.

[3] In particular, we observe that it was Crawford, not the circuit court, who first introduced the dice analogy; the circuit court's comments were merely a response given in a parallel form to the original statement. They are not demonstrative of punitive intent.

We also observe that Crawford's postconviction motion does not explain why the decision to proceed to trial was any more counsel's decision than his own. Indeed, his comments at sentencing suggest he had no interest in entering another plea.

"mistaken beliefs" of what he would be allowed to establish at trial relating to entrapment. Crawford also asserts that he just wanted an opportunity to explain how he got into his current situation and the circuit court, by denying his motion, deprived him of the opportunity to explain his "fixation" with explaining how he entered the internet exchange with police in the first place.

¶12 In denying Crawford's postconviction motion, the circuit court explained that it was "unknown what other information would have been presented." We agree: Crawford's allegations are simply conclusory. He does not say what his "mistaken beliefs" were or elaborate on his "fixation," much less explain why either is relevant or how that information might have changed the results of sentencing. *See* ***Allen***, 274 Wis. 2d 568, ¶¶23-24 (postconviction motions ought to allege who, what, where, when, why, and how). Without this information, even if we concluded that Crawford sufficiently pled deficient performance by counsel, we could not conclude he sufficiently alleged prejudice.

III. Preparing Crawford for sentencing.

¶13 Crawford complains that trial counsel failed to anticipate the circuit court's concerns about the likelihood of reoffense and about protecting the community, so counsel failed to adequately prepare Crawford to address those concerns at sentencing. The circuit court rejected this argument, noting that there was no way for trial counsel to anticipate the circuit court's questions, and that the motion "does not say what it is counsel should have apprised him about before [sentencing] to prepare him more fully."

¶14 We agree with the circuit court, in theory, that trial counsel cannot be expected to read the court's mind. However, given that protection of the community and rehabilitation of the defendant are two of the primary sentencing

objectives to be considered, *see* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, we do not think it is unreasonable or absurd for Crawford to have expected counsel to anticipate the circuit court's concern about his potential for reoffense.

¶15 Nevertheless, even if counsel's lack of foresight was deficient, Crawford has not shown it was prejudicial. To the extent the argument hinges on counsel's failure to call two witnesses, we discuss in greater detail below why Crawford has not shown that failure was prejudicial. To the extent the argument is that counsel failed to prepare Crawford to give a statement to the circuit court, the circuit court is correct that his motion fails to sufficiently allege any particulars about what counsel should have told Crawford in preparation, why it would have been relevant, or how it would have altered the outcome. *See* ***Allen***, 274 Wis. 2d 568, ¶23. Conclusory allegations do not warrant a hearing.

IV. The two witnesses.

¶16 Crawford also complains that trial counsel was ineffective because he did not call Crawford's sister or Hazel Flint, the mother of Crawford's child, to testify at sentencing. Crawford asserts that Flint could have testified about his "efforts in treatment." His sister would have testified about changes Crawford had made: specifically, the fact that he was living with her, that she had a password on her computer that Crawford did not know, and that she was at home the "majority of every day."

¶17 The circuit court also deemed this argument "entirely conclusory." That conclusion is certainly true as to Flint's proposed testimony about "efforts in treatment," and it is largely true about Crawford's sister's proposed testimony. The circuit court, however, also noted that even if Crawford's sister testified that

she kept him off of her computer most of the time, no one was offering any suggestion that Crawford had twenty-four hour supervision, or that he could not go elsewhere to access the computer and the internet. Thus, Crawford's sister's testimony was insufficient to address the circuit court's concern about Crawford's opportunities to reoffend. Moreover, the circuit court noted that it heard extensively from trial counsel regarding Crawford's "lifestyle changes" and therapy and treatment decisions, implying that both his sister's and Flint's testimony were cumulative.

¶18 On appeal, Crawford responds that he did, in fact, allege the specific information that his witnesses would have put forth. We disagree that the motion was sufficient. As noted, the motion alleged only that Flint would testify about Crawford's "efforts in treatment." We also observe that his sister's proposed testimony, though more specific, goes to her efforts, not his.[4]

¶19 In any event, we observe that the circuit court at sentencing had before it the presentencing investigation report prepared for the original sentencing, two updates to that report, a private report previously prepared for Crawford, and a psychologist's report indicating that Crawford would be no danger if supervised, in addition to trial counsel's statements at sentencing. Thus, we conclude that even if it was deficient performance not to call the two witnesses, Crawford has not sufficiently alleged prejudice from the absence of their testimony.

[4] Crawford also complains that the circuit court's hypothetical concerns, about the possibility that Crawford could go elsewhere to access the internet, were possible, but that at a hearing, he would have shown it to be unlikely. This assertion, like Crawford's motion, is entirely conclusory.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).