COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1963 **Cir. Ct. No. 2007CF424**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY J. MCCREDIE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: JEROME J. FOX, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Kelly J. McCredie appeals pro se from an order summarily denying his WIS. STAT. § 974.06 (2009-10)[1] postconviction motion.

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

He asserts that he is entitled to an evidentiary hearing to determine whether he received the ineffective assistance of postconviction and trial counsel based on trial counsel's failure to (1) object to the submission of a lesser-included offense, (2) discuss with McCredie his decision not to testify in light of the lesser-included offense, (3) challenge the charges as multiplicitous, and (4) investigate the physical disparity between McCredie and his brother. We conclude that McCredie is not entitled to an evidentiary hearing because his allegations, even if proven, do not demonstrate that he received the ineffective assistance of trial counsel. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996) (where a defendant seeks an evidentiary hearing on an ineffective assistance of counsel claim, the trial court may deny the motion without an evidentiary hearing if the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief).

¶2 In 2008, McCredie went to trial on three counts of second-degree sexual assault involving three acts of sexual intercourse with the same victim without her consent and by the use of force, contrary to WIS. STAT. § 940.225(2)(a). With regard to the third count, the jury was also instructed on the lesser-included offense of third-degree sexual assault contrary to § 940.225(3), which requires intercourse without the victim's consent. McCredie was acquitted of the first two counts. On the third count, the jury acquitted McCredie of second-degree sexual assault, but convicted him of the lesser offense. On direct appeal, we affirmed the judgment of conviction. ***State v. McCredie***, No. 2010AP1179-CR, unpublished slip op. (WI App Mar. 2, 2011).

¶3 Thereafter, McCredie, pro se, filed the underlying WIS. STAT. § 974.06 postconviction motion in the trial court asserting that postconviction counsel was ineffective for failing to file a WIS. STAT. § 974.02 postconviction

motion alleging the ineffective assistance of trial counsel.[2] As part of his appendix, McCredie included his written correspondence with postconviction counsel which confirmed that they had discussed the possibility of alleging the ineffectiveness of trial counsel, but that postconviction counsel did not believe there were arguable grounds to pursue these claims.

¶4 The trial court denied McCredie's WIS. STAT. § 974.06 postconviction motion without a hearing, in part because it concluded that it lacked jurisdiction to decide McCredie's motion under ***State v. Knight***,[3] but also because "the files and records in this action conclusively show that McCredie is entitled to no relief." McCredie filed a reconsideration motion, arguing primarily that the trial court erroneously determined that it lacked jurisdiction. The trial court denied reconsideration, reiterating that McCredie's "original motion was little more than a compilation of conclusory allegations about both trial and post-conviction counsel's conduct and in no way contained the material facts which would entitle him to any of the relief which he requested."

[2] The State argues that McCredie is procedurally barred from raising these claims because he had a direct appeal and the record demonstrates that appellate counsel had strategic reasons for not raising these newly asserted issues. While we agree that the record more than sufficiently demonstrates that postconviction counsel had strategic reasons for not raising McCredie's claims in a postconviction motion, we also note that in some circumstances, ineffective postconviction counsel may constitute a sufficient reason for failing to raise an issue on direct appeal. *See* ***State v. Balliette***, 2011 WI 79, ¶37, 336 Wis. 2d 358, 805 N.W.2d 334.

[3] ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (claims alleging ineffective assistance of appellate counsel must be raised in a petition for writ of habeas corpus in the court of appeals).

¶5 While we agree with McCredie that his claims were properly raised in his WIS. STAT. § 974.06 motion to the trial court,[4] we conclude that McCredie is not entitled to an evidentiary hearing because the record conclusively demonstrates that his underlying claims lack merit. *See* ***State v. Ziebart***, 2003 WI App 258, ¶¶15, 33, 268 Wis. 2d 468, 673 N.W.2d 369 ("Whether a motion alleges facts warranting relief, thus entitling a defendant to a hearing, is a legal issue we review *de novo*."). Given our determination that McCredie's underlying claims lack merit, counsel was not ineffective and McCredie is not entitled to a new trial. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected).

Trial counsel was not ineffective for failing to object to the submission of a lesser-included offense or failing to revisit McCredie's decision not to testify.

¶6 Count three of the information originally charged McCredie with second-degree sexual assault for having sexual intercourse with the victim without her consent and by the use of force. The jury was also instructed on the lesser charge of third-degree sexual assault which requires intercourse without the victim's consent, but does not require that the State prove force. McCredie argues that trial counsel was ineffective for (1) failing to object to the lesser-included offense of third-degree sexual assault and (2) neglecting to revisit McCredie's

[4] Where a defendant asserts that postconviction counsel was ineffective for failing to file a WIS. STAT. § 974.02 postconviction motion alleging the ineffectiveness of trial counsel, the proper remedy is to file either a habeas petition or a WIS. STAT. § 974.06 motion in the trial court. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996).

decision not to testify once it became clear that the trial court was going to instruct the jury on the lesser offense.

¶7 A defendant seeking to prove ineffective assistance must show both that counsel's performance was deficient and that this deficiency was prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. To satisfy the first prong, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness. ***Id.***, ¶19. The second prong requires proof of a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. ***Id.***, ¶20. If the defendant fails to prove one prong, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶8 McCredie agrees that third-degree sexual assault is a lesser offense of second-degree sexual assault but asserts that the evidence does not support the instruction in this case. *See* ***State v. Muentner***, 138 Wis. 2d 374, 387, 406 N.W.2d 415 (1987) (once it is determined that the lesser charge is an included offense, the court must determine whether the evidence of record provides a reasonable factual basis for acquittal on the greater offense and conviction on the lesser offense). We disagree.

¶9 The victim testified that McCredie restrained her arms for the first act of intercourse and that he used force to turn her over and push her head into a pillow during the second act of intercourse, which involved anal penetration. With regard to the third act, she testified that McCredie eventually stopped the anal penetration after she complained of pain and then re-entered her vaginally. As stated in postconviction counsel's letter to McCredie explaining why the issue was meritless, "[t]he jury could have found that the change from anal penetration to

vaginal penetration, as [the victim] described it, was not accomplished by the use of force."

¶10 There is another reasonable view of the evidence that supports the lesser-included instruction. Given the evidence that the victim never cried out for help, never mentioned the use of force to her sister immediately after the assault, and was afraid that resistance would endanger her children who were also in the bedroom, the jury could have reasonably found that McCredie never used force during any of the assaultive acts, a view that is not only supported by the evidence but also by the jury's verdicts in this case. There was ample support for the lesser-included instruction and trial counsel was not ineffective for failing to lodge a meritless objection.[5]

¶11 We also reject McCredie's argument that once the decision was made to instruct the jury on the lesser offense, trial counsel was ineffective for not ensuring that McCredie would be able to testify. Here, McCredie faults trial counsel for "fail[ing] to inform [him] his testimony was now needed to rebut [the victim's] testimony pertaining to the 'consent' factor of the lesser included offense."

¶12 The flaw in McCredie's argument is that the victim's lack of consent was also an essential element of the greater offense, second-degree sexual assault. At the time McCredie originally decided not to testify, he was aware that nonconsent was an element and made a decision not to "rebut [the victim's] testimony" regarding consent. The lesser-included offense did not add any new

[5] For these reasons, we reject McCredie's argument that the lesser-included instruction violated his due process rights. We also note that because there was no objection in the trial court, this issue is best addressed under the rubric of an ineffectiveness analysis.

elements and there was no reason for trial counsel to believe that McCredie's decision not to testify would have changed.

¶13 Further, there was no reason for trial counsel to believe a request to permit McCredie's testimony would have been successful. The right to testify exists during the evidence-taking stage of trial and, once the evidence is closed, "whether to reopen for submission of additional testimony is a matter left to the trial court's discretion." ***State v. Arredondo***, 2004 WI App 7, ¶19, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). The trial court must consider "whether the likely value of the defendant's testimony outweighs the potential for disruption or prejudice in the proceedings, and if so whether the defendant has a reasonable excuse for failing to present the testimony during his chase-in-chief." ***Id.*** (citation omitted). Given the trial court's earlier colloquy with McCredie concerning his right to testify and the notion that McCredie's change of heart would not have been triggered by unexpected witness testimony or the addition of new elements, a motion by trial counsel to re-open the evidence would almost certainly have been futile. As stated in the trial court's order denying McCredie's WIS. STAT. § 974.06 motion, McCredie's assertion that the lesser-included instruction would have changed his trial strategy "is implausible at best." McCredie has not established that trial counsel was ineffective. ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (counsel's failure to present a legal challenge is not prejudicial if the defendant cannot establish that the challenge would have succeeded).

Trial counsel was not ineffective for failing to file a pretrial motion challenging the charges as multiplicitous.

¶14 The original criminal complaint charged a single count of second-degree sexual assault and alleged several acts of intercourse as a factual basis. Prior to arraignment, the State altered its strategy and filed an information charging three separate counts based on the separate acts of intercourse alleged in the criminal complaint. McCredie asserts that trial counsel should have argued prior to trial that the three counts of second-degree sexual assault were multiplicitous.

¶15 Multiplicity arises when a single offense is charged as multiple counts rather than merged. ***State v. Ziegler***, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. The test to determine whether multiple counts are permissible is first, whether the charges are identical in law and fact, and second, whether the legislature intended to allow more than one unit of prosecution. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Charges are different in fact if they are separated in time or place, require separate acts of volition within a course of conduct, or are otherwise of a significantly different nature. ***Id.*** at 748-49. Because they differ in factual nature, "[d]ifferent types of sexual intercourse constitute different crimes although they take place during a short period of time and are a part of the same assaultive episode." ***State v. Eisch***, 96 Wis. 2d 25, 30, 42, 291 N.W.2d 800 (1980).

¶16 Trial counsel was not ineffective for failing to raise McCredie's multiplicity claim. First of all, the charges were not multiplicitous. As in ***Eisch***, each act of intercourse involved a new and distinct intrusion into a different body part. ***Id.*** at 27, 31. Second, there was no prejudice to McCredie because he was

acquitted of two of the three charges and no double jeopardy implications arise from his single conviction. Third, had trial counsel challenged the separate charges and prevailed, the remedy would have been for the State to charge McCredie as it had in the complaint, with one count of second-degree sexual assault based on several acts of intercourse. *See* ***State v. Lomagro***, 113 Wis. 2d 582, 597 n.6, 335 N.W.2d 583 (1983) (recognizing that separate but conceptually similar acts may be properly charged either in a single count or as separate counts). Contrary to McCredie's assertion that he would have faced trial on only the first act, which involved vaginal penetration, the State had the discretion to charge all three as one continuing course of conduct. Under ***Lomagro***, the jury could have convicted McCredie if each juror found that at least one of the acts had occurred, even if there was no unanimity as to which act transpired. ***Id.*** at 597-98. Given that the jury believed that McCredie had sexual intercourse with the victim without her consent at least one time, there is no reason to believe he would have been acquitted had the acts been charged in a single count.[6]

Trial counsel was not ineffective for not investigating and impeaching the victim with the physical differences between McCredie and his brother.

¶17 The victim testified that when she became aware that someone was on top of her, she initially believed it was McCredie's brother. McCredie asserts that trial counsel was ineffective for failing to investigate and introduce evidence of the size difference between McCredie and his brother because this would have impeached the victim. We disagree.

[6] Given the evidence at trial and the fact that the State requested a lesser-included offense at McCredie's trial, the reasonable assumption is that the jury would have been instructed on the lesser offense even if McCredie had been charged in a single count.

¶18 Any size disparity between McCredie and his brother would not have impeached the victim's testimony. The victim testified that she could not see who was on top of her because there was no light in the room. She testified she initially believed it might be McCredie's brother because of some text messages they had earlier exchanged, but that she realized it was not McCredie's brother when he started speaking. Evidence of the difference in size would not have contradicted the victim's testimony or called her credibility into question.

¶19 Additionally, trial counsel did elicit evidence of the brothers' physical difference. At trial, the victim's sister testified that McCredie was taller and thinner than his brother, the precise disparity McCredie now asserts. McCredie was not prejudiced by trial counsel's alleged failure to further investigate the brothers' purported size disparity.

¶20 In sum, aside from any possible procedural bar, McCredie's WIS. STAT. § 974.06 motion failed to establish sufficient facts to warrant a hearing on the alleged ineffectiveness of either trial or postconviction counsel. McCredie's motion conclusively fails to support an inference that trial counsel was deficient or that the alleged deficiencies rendered his conviction unreliable. The trial court did not err in summarily denying his motion.

By the Court.—Order affirmed.

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