COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1268

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD LEROY BEILKE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

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

PER CURIAM. Ronald Leroy Beilke was convicted of two counts of sexual assault. *See* § 940.225(1)(d), STATS., 1985–86. He appeals *pro se* from the trial court's orders denying his motion for postconviction relief and his motion for sentence modification. Beilke argues: (1) that the trial court erred in denying his motion for postconviction relief without a hearing; and (2) that the trial court

erred in concluding that his transfer to Texas was not a new sentencing factor. We affirm.

BACKGROUND

We adopt the following statement of facts from our opinion on Beilke's direct appeal:

> At the trial, the victim testified, as did her younger sister. According to the victim, Beilke entered the bedroom where she was sleeping with her younger sister and shook the victim awake. Telling her not to tell her mother, he put his penis in her mouth and manipulated her anus with his finger. Her sister testified both that she saw Beilke sexually assaulting the victim and that she knew about the sexual assault because the victim had told her about it.
>
> ….
>
> Beilke denied that the sexual assault occurred. He did not, however, characterize the victim as a liar, nor did he accuse her of knowingly fabricating the charge. In his argument challenging the testimony and during closing arguments, he suggested that the victim had imagined, fantasized, or dreamed the incident. During closing argument, counsel specifically told the jury, "it's possible that this didn't happen even though she's not lying because I'm not saying she's lying. She could be lying, but frankly I don't think she's lying …." He suggested rather that as a child, her sense of reality was more easily confused than was an adult's.

State v. Beilke, No. 91-1341-CR, unpublished slip op. at 2–3 (Wis. Ct. App. Feb. 4, 1992). Beilke's counsel also said the following during his closing argument:

> The judge, right at the end, read to you among the jury instructions that he was reading to you, he read to you some instructions that told you what the elements of the alleged crimes were. [The prosecutor] went over those elements with you. Both of them required a person be under 12 years of age. Both of them—One of them required that you find that there was – that what was done was done for sexual gratification. You have to find either

> in regard to one of the charges that there was sexual intercourse, and in regards to the other charge that there was sexual contact. But I'm not [sic] going to tell you right now that to my way of thinking that's not very important. To my way of thinking, you don't have to spend too much time considering the various elements, the exact legal requirements that are involved in these charges. Because really this doesn't come down to a case where we're quibbling about certain legal technicalities. We're not quibbling about well when Mr. Beilke touched the child, was he doing it for purposes of sexual gratification or was he doing it for other purposes. We're not talking about any sort of quibbles like this.
>
> What this case comes down to quite simply is one question. Did he do what [K.Z.] said he did? If in fact he did those things, then he would be guilty. If you believe beyond a reasonable doubt that he did those things, then he would be guilty of all these charges. That's what the whole case comes down to. Did he do what [K.Z.] said he did[?]

The jury found Beilke guilty as charged in the information, and the trial court entered a judgment of conviction accordingly. The trial court sentenced Beilke to two consecutive eight-year prison terms. In 1997, Beilke was transferred to a facility in Texas, at which he is serving a portion of his sentence.

DISCUSSION

Beilke argues that the trial court erred in denying his motion for postconviction relief, in which he alleged that he had received ineffective assistance of counsel, without a hearing. If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. ***Id.***

> [I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only

> conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (citations omitted). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See* ***id.***, 201 Wis.2d at 311, 548 N.W.2d at 53.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Whether counsel's conduct amounts to ineffective assistance is a question of law that we review *de novo*. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76.

In his postconviction motion, Beilke set forth the following allegations:

> Defendant's conviction in the instant matter is contrary to the Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution, having been obtained as a direct result of the ineffective assistance of counsel before and/or during trial, by virtue of the following acts or omissions:
>
> A. Counsel's failure to present expert testimony on child memory in support of his theory of the case (Tr. 5/11/90:34-40), deprived the jury of information critical to a proper determination of the issues presented at trial.

> B. Counsel's failure to investigate defendant's knee injury (Tr. 5/10/90:125-26), expert testimony relative to which would have conclusively proven that the alleged incident could not have occurred as related by K.Z.
>
> C. Counsel's closing argument that the legal elements of the charges were "not very important" and that, if defendant did what K.Z. said he did, he's guilty of the charged offenses (Tr. 5/11/90:32-34) relieved the State of its burden of proof as to every element of the charged offenses beyond a reasonable doubt.

Beilke further alleged that his postconviction counsel was ineffective for failing to pursue these claims in a postconviction motion prior to his direct appeal. We conclude that the trial court properly rejected Beilke's motion for postconviction relief without a hearing.

Beilke's first allegation, that his trial counsel was ineffective in failing to present expert testimony regarding child memory, fails to set forth an offer of proof as to what an expert would say relevant to this case. Likewise, Beilke's allegation that expert testimony regarding his alleged knee injury would have conclusively proved that the crime did not occur as related by the victim, also fails to set forth the content of the desired expert testimony. Without any specific allegation as to the content of the proposed testimony, there is no basis on which to conclude that Beilke was prejudiced by the lack of such expert testimony. Thus, Beilke has failed to allege sufficient facts to raise an issue of fact regarding counsel's performance in these respects. *See* ***Bentley***, 201 Wis.2d at 309–310, 548 N.W.2d at 53.

Beilke's final allegation, that his trial counsel was ineffective in stating that Beilke was guilty if the jury believed the victim, is without merit. The crimes with which Beilke was charged were defined by statute as follows:

> **Sexual assault. (1)** FIRST DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class B felony:
>
> ….
>
> (d) Has sexual contact or sexual intercourse with a person 12 years of age or younger.
>
> ….
>
> **(5)** DEFINITIONS. In this section:
>
> (a) "Sexual contact" means any intentional touching by the complainant or defendant, either directly or through the clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1).
>
> (b) "Sexual intercourse" includes the meaning assigned under s. 939.22 (36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

Section 940.225(1)(d) and (5), STATS., 1985–86. In his closing argument, Beilke's counsel acknowledged that if Beilke had put his penis in the victim's mouth and placed his finger in her anus, as reported by the victim, who was undisputedly under twelve at the time of the alleged offense, then Beilke was guilty. Indeed, Beilke could not reasonably have argued that the events, as reported by the victim, did not satisfy the elements of first-degree sexual assault. The record reveals that Beilke's defense was that the victim had imagined or fantasized the alleged sexual contact. As such, it was reasonable for his attorney to emphasize to the jury that their deliberations should focus on the trustworthiness of the victim's account of the events rather than whether those events satisfied the elements of first-degree sexual assault. *See* ***State v. Eckert***, 203 Wis.2d 497, 507–511, 553 N.W.2d 539, 543–545 (Ct. App. 1996) (the right to

effective assistance of counsel does not require counsel to undermine his chosen defense strategy by presenting the jury with an inconsistent alternative defense). Thus, the record conclusively demonstrates that Beilke's counsel did not render ineffective assistance in his closing argument.

Beilke also challenges the trial court's denial of his motion to modify his sentence on the basis of a new factor. He argues that the trial court erred in determining that his transfer to Texas was not a new factor. A new factor is:

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Michels, 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989) (quoted source omitted). If a defendant establishes the existence of a new factor by clear and convincing evidence, the trial court has discretion to modify the defendant's sentence. *See* ***id.***, 150 Wis.2d at 97, 441 N.W.2d at 279. Whether a particular fact or set of facts constitutes a new factor is a question of law, subject to *de novo* review. *See* ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A new factor must be an event or development which frustrates the purpose of the original sentence. *See* ***Michels***, 150 Wis.2d at 97, 441 N.W.2d at 279.

The record reveals that the trial court based Beilke's sentence primarily on the nature and gravity of the offense, and on Beilke's character. Specifically, the trial court noted that the victim was young and vulnerable, that Beilke refused to accept responsibility for the crime, and that Beilke had a prior criminal record. The trial court did not base its sentencing decision upon Beilke's

serving his sentence at any particular facility. Moreover, the transfer of inmates among correctional institutions is within the purview of the Department of Corrections, rather than the trial court, *see* WIS. ADM. CODE § DOC 302.20, and if Beilke seeks to challenge the conditions of his confinement, the proper remedy is not sentence modification, but, rather, "corrective measures directed to changing the conditions of confinement," ***State v. Krieger***, 163 Wis.2d 241, 259–260, 471 N.W.2d 599, 606 (Ct. App. 1991). Beilke's transfer to Texas, therefore, did not frustrate the trial court's intent in imposing sentence, and is not a new factor.

By the Court.—Orders affirmed.

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