COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1025 **Cir. Ct. No. 2001CF755**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN ALLEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Allen, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for postconviction relief. In the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

postconviction motion, Allen argued that his postconviction counsel was ineffective for failing to raise numerous challenges to the effectiveness of trial counsel. As explained below, some of the issues Allen raises were previously litigated, some are procedurally barred, and some fail on their merits. We also reject Allen's request for a new trial in the interest of justice. Accordingly, we affirm.

BACKGROUND

¶2 A jury found Allen guilty of the first-degree sexual assault of Tekiara B. and Shalisia B., his stepdaughters, and of the second-degree sexual assault of Kelyanna A. The historical and procedural facts underlying Allen's conviction were set forth in previous appellate opinions, and we need not restate them here. *See* ***State v. Allen***, No. 2002AP2555-CR, unpublished slip op., ¶¶2-5, (WI App Sept. 9, 2003) (***Allen I***); ***State v. Allen***, 2004 WI 106, ¶¶3-8, 274 Wis. 2d 568, 682 N.W.2d 433 (***Allen II***). We will state additional facts as necessary to address Allen's current arguments.

¶3 After the supreme court affirmed Allen's conviction, Allen filed the WIS. STAT. § 974.06 postconviction motion that underlies this appeal. In his motion, Allen contended that his postconviction counsel was ineffective for not challenging the effectiveness of trial counsel in the following respects:

- Failure to call as witnesses Lynn A., the mother of Kelyanna A., Detective Michael Braunreiter, Mildred Austin, the foster mother of Kelyanna A., and Laurie Lashion;
- Failure to request discovery and the criminal complaint;
- Failure to object to hearsay testimony of Kelyanna A.;

- Failure to challenge the credibility of Kelyanna A. and Patricia B., the mother of Tekiara B. and Shalisia B.; and

- Inadequate investigation and trial preparation.

¶4 Additionally, Allen contended that the postconviction counsel should have argued against the amendment of the criminal complaint to conform to the trial evidence; that the allegations of the criminal complaint did not match the victims' testimony; and that the evidence was insufficient and there was no "co-berating [sic] witnesses."

¶5 The trial court denied Allen's motion, and on appeal, Allen renews the above-described arguments. For ease of discussion, we will adopt the convention used by the State in its appellate brief and group Allen's arguments according to why they fail.

ANALYSIS

I. Previously Litigated Issues.

¶6 Issues that have been previously considered on direct appeal cannot be reconsidered in a WIS. STAT. § 974.06 postconviction motion. ***State v. Brown***, 96 Wis. 2d 238, 241, 291 N.W.2d 528 (1980). "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶7 In his postconviction motion filed under WIS. STAT. RULE 809.30(2)(h), Allen argued that his trial counsel was ineffective for not calling as a witness Lynn A., his wife and the mother of Tekiara B. and Shalisia B. The

postconviction court concluded that Allen had not established prejudice. Allen did not raise that argument in his appeal, ***Allen I***, unpublished slip op. ¶5 n.2, and the supreme court deemed the issue waived, ***Allen II***, 274 Wis. 2d 568, ¶17 n.9. Allen's claim that Lynn A. should have been called as a witness was litigated in his initial RULE 809.30(2)(h) postconviction motion. Allen could have, but did not, pursue the issue on his direct appeal. He cannot revive the issue in this subsequent WIS. STAT. § 974.06 postconviction motion.

¶8 Allen's arguments that his trial counsel was ineffective because he did not adequately investigate and did not review all of the discovery materials were also raised in Allen's WIS. STAT. RULE 809.30(2)(h) postconviction motion. In ***Allen I***, unpublished slip op. ¶10, we stated that "Allen claims that his trial counsel was ineffective because he failed to adequately investigate." The trial excerpt reproduced in ***Allen I***, *see* ***id.***, ¶10, shows that Allen was complaining about his attorney's failure to talk to a person he believed worked for the district attorney's office and who had talked with one of the victims at her school. Allen's appellate brief in this case describes Laurie Lashion as a person employed by the Bureau of Milwaukee Child Welfare who spoke with Tekiara B. at her school. Thus, Allen has already litigated whether his trial counsel was ineffective for not calling Lashion as a witness, and he cannot relitigate the issue. As for whether Allen's trial counsel was ineffective for not reviewing discovery, in ***Allen I***, we held that Allen "has not shown beyond mere assertion that his trial lawyer did not review all of the discovery materials." ***Id.***, ¶10. Allen cannot relitigate the issue. *See* ***State v. Walberg***, 109 Wis. 2d 96, 103, 325 N.W.2d 687 (1982) (WISCONSIN STAT. § 974.06 postconviction motion cannot be used to raise issues disposed of by a previous appeal.).

II. Procedurally Barred Issues.

¶9 Ordinarily, all grounds for relief under WIS. STAT. § 974.06 (including issues involving ineffective assistance of trial counsel) must be raised in the original, supplemental or amended postconviction motion before the trial court in order to be preserved for appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Issues not raised in the first such motion are waived, "*unless* the court ascertains that a 'sufficient reason' exists" for the failure to raise the issue. ***Id.*** at 181-82 (emphasis in original). In some circumstances, ineffective assistance of postconviction counsel may justify defendant's failure to raise issues of ineffective assistance of trial counsel or other constitutional or jurisdictional issues. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶10 Two of the issues in Allen's WIS. STAT. § 974.06 motion are not linked to a claim of ineffective assistance of postconviction counsel and, as such, they are barred by ***Escalona-Naranjo***. Allen's challenge to the sufficiency of the evidence, including his belief that there was inadequate corroboration of the victims' testimony, could have been raised in his direct appeal. His contention that the allegations in the criminal complaint were not supported by victims' testimony also could have been raised in his direct appeal. Because Allen failed to raise those issues in his direct appeal, and because he offers no reason to explain that failure, the issues are procedurally barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

III. Ineffective Assistance of Postconviction Counsel.

¶11 As noted, a claim of ineffective assistance of postconviction counsel for not challenging the effectiveness of trial counsel may overcome the procedural

bar of ***Escalona-Naranjo***. ***Rothering***, 205 Wis. 2d at 682. When a defendant claims ineffective assistance of postconviction counsel on the basis of a failure to assert trial counsel's ineffectiveness, however, the defendant must first establish that trial counsel provided ineffective assistance. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. We now turn to the merits of the issues that Allen has raised in this context.

¶12 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** at 697. 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.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** Counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶13 Allen complains that his trial counsel did not call Detective Braunreiter, apparently to testify that Lynn A. told him that she did not believe Shalisia B.'s accusations against Allen. Testimony about the credibility of witnesses is not permitted because it encroaches on the jury's role as "'lie detector in the courtroom.'" ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (quoting ***United States v. Barnard***, 490 F.2d 907, 912 (9th Cir. 1973)). "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96.

Because any testimony from Braunreiter that included an opinion about Shalisia B.'s credibility would have been inadmissible under ***Haseltine***, Allen's trial counsel was not ineffective for not calling him as a witness. *See* ***Toliver***, 187 Wis. 2d at 360 (counsel is not ineffective for failing to make meritless arguments).

¶14 Allen complains that his trial counsel did not "argue the amended charges." At the conclusion of the State's case, the State asked that the timeframes alleged in the criminal complaint be amended to conform to the victims' testimony as to when the sexual assaults occurred. Over the objection of Allen's trial counsel, the trial court granted the State's motion.

¶15 Trial counsel was not ineffective. Under WIS. STAT. § 971.29(2), a "court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." Contrary to Allen's contention in this appeal, his trial counsel did "argue [against] the amendment" but the trial court did not agree with Allen's position. Allen asserts that the amendment of the charges as to time frame left him with "no coherent theory of defense to the jury." Allen's assertion of prejudice is conclusory. We also agree with the State's observation that Allen's claim of prejudice is questionable because he denied committing the alleged assaults, regardless of when they were alleged to have occurred.

¶16 Allen contends that his trial counsel should have called Mildred A., Kelyanna A.'s foster mother, to dispute Kelyanna A.'s testimony. To the extent that Mildred A. might have testified about Kelyanna A.'s credibility, such testimony would not have been admissible. *See* ***Haseltine***, 120 Wis. 2d at 96.

¶17 Allen also complains that his trial counsel should have objected to Kelyanna A.'s testimony concerning when she graduated from the eighth grade.

Kelyanna A. testified to her graduation date from her own knowledge but Allen believes that a hearsay objection should have been raised because Kelyanna A. also testified that, over a lunch break, she had "called home and my mother has all my diplomas, and she read it off to me, Thomas Edison Middle School, June 8, 1995."

¶18 We agree with the State that "even assuming [trial] counsel should have objected on hearsay grounds" to Kelyanna A.'s description of her lunchtime conversation with Mildred A., Allen has not shown any prejudice. Kelyanna A. had already testified that she graduated from the eighth grade in 1995—the confirmation of that date through Mildred A. added little. Moreover, Allen does not claim that Kelyanna A. is mistaken as to when she graduated, nor does he allege any material facts showing why Mildred A.'s confirmation of the year prejudiced him.

¶19 Allen complains that his trial counsel should have challenged Kelyanna A.'s credibility by asking her about her relationship with an older man. Allen asserts that Kelyanna A.'s credibility "would have been tainted" if the jury had known "she was dating a man six years older than she was when she was 14." WISCONSIN STAT. § 972.11(2), the rape shield law, precludes the admission of evidence regarding a complainant's prior sexual conduct or behavior unless a statutory or judicially created exception applies. Allen does not contend that Kelyanna A.'s relationship with the twenty-year-old man falls into one of those exceptions. Because this evidence was not admissible, trial counsel was not ineffective by not attempting to introduce it.

¶20 Allen contends that trial counsel should have asked Patricia B. about telephone calls that Patricia B. had made to child protective services in which she

"made allegations which were found not to be true, all in an attempt to obtain custody of Shalisia." Allen concludes that "if the jury had heard these facts ... it would have … doubt[ed]" Patricia B.'s testimony.

¶21 Allen's contention is nothing more than an argument that his trial counsel's failure to question Patricia B. was deficient performance and prejudicial because the jury found him guilty. It is, therefore, a conclusory argument that does not entitle him to relief. *See* ***Allen II***, 274 Wis. 2d 568, ¶24.

IV. Interest of Justice.

¶22 Finally, Allen asks this court to order a new trial in the interest of justice on the ground that the real controversy was not fully tried. *See* WIS. STAT. § 752.35. Allen made this same request in his direct appeal, and both this court and the supreme court denied it. *See* ***Allen I***, unpublished slip op., ¶18; ***Allen II***, 274 Wis. 2d 568, ¶35. Allen's arguments are again not persuasive, and we again reject his request for a new trial in the interest of justice.

By the Court.—Order affirmed.

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