COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP708 **Cir. Ct. No. 1994CF941186**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN TONY DAVIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Allen Tony Davis, *pro se*, appeals from an order denying the motion for postconviction relief that he filed pursuant to WIS. STAT. § 974.06 (2011–12).[1] We affirm the order.

BACKGROUND

¶2 We will not repeat the recitation of facts outlined in our prior decision resolving Davis's direct appeal. *See* ***State v. Davis***, No. 1997AP3772-CR, unpublished slip op. (WI App March 23, 1999). For purposes of resolving this appeal, it suffices to say that Davis was charged with having sexual intercourse and contact with the thirteen-year-old daughter of a woman he was dating. Two juries found Davis guilty of four counts of sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (1993–94). Davis was granted the second trial in part because the State introduced Davis's statement at the first trial after indicating that it would not do so and Davis's trial lawyer did not object. After the second jury found David guilty, Davis's postconviction lawyer filed a postconviction motion that alleged sixteen errors. The motion was denied in a written decision, without an evidentiary hearing. On appeal, Davis's lawyer pursued twelve of those issues. We rejected each argument and affirmed the convictions.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 Nearly fourteen years later, Davis filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. In that motion, Davis attempted to avoid the prohibition against successive postconviction motions by alleging that his *postconviction* lawyer provided constitutionally deficient representation by not alleging that his *trial* lawyer provided constitutionally deficient representation in several ways. Specifically, Davis argued that his trial lawyer should have: (1) objected to the State's statements during its opening statement and closing argument concerning the victim's lack of other sexual partners and the medical evidence; (2) objected to testimony from a nurse practitioner who examined the victim nearly a year after the alleged assaults and determined that the victim had healed "hymenal tags" that were consistent with sexual intercourse in the past; (3) "neutralize[d]" the nurse practitioner's testimony concerning the cause of the hymenal tags; (4) examined two witnesses—the victim's father and friend—about statements the victim allegedly made concerning her hatred of Davis; and (5) presented evidence that a psychologist determined "that Davis's clinical profile was not consistent with expectations for sexual assault perpetrators." The circuit court considered the merits of each of Davis's claims and denied the motion without a hearing.[2]

[2] The Honorable Jeffery A. Wagner denied the postconviction motion. The Honorable Jeffery A. Kremers presided over the jury trial and the postconviction proceedings that preceded Davis's direct appeal.

LEGAL STANDARDS

¶4 "A defendant is not automatically entitled to a hearing on a postconviction motion." ***State v. Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d 468, 489, 673 N.W.2d 369, 379. If the motion "presents only conclusory allegations … or if the record conclusively demonstrates that the defendant is not entitled to relief, the court may deny the motion on its face." *See* ***ibid.*** Sufficiency of the motion is a question of law we review *de novo*. *See* ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 123–124, 700 N.W.2d 62, 68. If the motion is insufficient, the decision to grant or deny a hearing is left to the circuit court's discretion, which we review only for an erroneous exercise of that discretion. *See* ***id.***, 2005 WI 116, ¶26, 284 Wis. 2d at 124, 700 N.W.2d at 68.

¶5 A motion brought under WIS. STAT. § 974.06 is typically barred if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in a motion preceding the first appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994). A postconviction lawyer's constitutionally deficient performance may constitute a "sufficient reason" for not previously raising an issue. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996).

¶6 To prove that a lawyer's performance was constitutionally deficient, the defendant must show that the lawyer's action or inaction constituted deficient performance and that the deficiency prejudiced the defendant. *See* ***Love***, 2005 WI 116, ¶30, 284 Wis. 2d at 126, 700 N.W.2d at 70. To prove deficiency, the defendant must establish that the lawyer's conduct fell "below an objective standard of reasonableness." ***Ibid.*** To demonstrate prejudice, the defendant must

show "'a reasonable probability that, but for [the lawyer's] unprofessional errors, the result of the proceeding would have been different.'" ***Ibid.*** (citation and one set of quotation marks omitted). If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

DISCUSSION

¶7 As noted, when the circuit court considered Davis's WIS. STAT. § 974.06 motion, it elected to consider the merits of each of Davis's allegations concerning his trial lawyer's performance. On appeal, the State asserts that "Davis's motion failed to adequately allege that postconviction counsel's ineffectiveness was a sufficient reason to excuse his failure to raise his ineffective assistance of trial counsel claims on direct appeal" and urges this court to "affirm on this basis." *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 651 n.8, 770 N.W.2d 755, 761 n.8 ("On appeal, we may affirm on different grounds than those relied on by the [circuit] court.").

¶8 We agree with the State that Davis's motion inadequately alleged that his postconviction lawyer provided constitutionally deficient representation. It is up to the postconviction lawyer to decide which issues to raise, and the lawyer need not "raise every 'colorable' claim." ***Jones v. Barnes***, 463 U.S. 745, 751–754 (1983). "[I]t is still possible to bring a ***Strickland*** claim based on [a lawyer's] failure to raise a particular claim, but it is difficult to demonstrate that [the lawyer] was incompetent" because "'[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (citation omitted); *see also* ***State v. Starks***, 2013 WI 69, ¶60, 349 Wis. 2d 274, 308, 833

N.W.2d 146, 163 (adopting "'clearly stronger'" standard for claims that appellate lawyer provided constitutionally deficient representation).

¶9 In this case, Davis did not specifically allege, much less demonstrate, that the issues he now raises concerning his trial lawyer's performance are "clearly stronger" than the sixteen issues his postconviction lawyer chose to raise in a postconviction motion. Davis's WIS. STAT. § 974.06 motion did not discuss the merits of the sixteen issues that were previously raised; indeed, the only place those claims are listed is in Davis's appendix to his postconviction motion. Further, Davis's postconviction motion presented only conclusory allegations that his postconviction lawyer's failure to raise specific claims concerning Davis's trial lawyer's performance was "objectively unreasonable" and "offends generally accepted principles of comity[, undermining] the accuracy and efficiency of the state judicial system to the detriment of all concerned." Because Davis's postconviction motion failed to allege that the issues he was raising were "clearly stronger" than those presented by his postconviction lawyer, and because he presented only conclusory allegations concerning his lawyer's failure to allege that the trial lawyer provided constitutionally deficient representation, the motion was inadequate and the circuit court was entitled to deny it without an evidentiary hearing. *See* ***Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d at 489, 673 N.W.2d at 379. For those reasons, we affirm the circuit court's order.

¶10 Davis's postconviction motion also fails because the Record conclusively demonstrates that Davis was not entitled to relief based on his allegations that his trial lawyer provided constitutionally deficient representation. *See* ***ibid.*** We will briefly address the merits of Davis's arguments concerning his trial lawyer's performance. We conclude that based on the lack of merit, the

circuit court did not erroneously exercise its discretion when it denied Davis's motion without an evidentiary hearing.

¶11 First, Davis's postconviction motion asserted that his trial lawyer should have objected when the State, during its opening statement and closing argument, mentioned both the victim's lack of prior sexual contact and the medical testimony from a nurse practitioner. We have reviewed the State's comments concerning the nurse practitioner's testimony and we are not convinced that those comments were objectionable. In the opening, the State was forecasting what the nurse practitioner would say, and in the closing, the State summarized that testimony. Lawyers for both the State and Davis argued about the significance of the nurse practitioner's testimony. We do not agree that Davis's lawyer provided deficient representation by not objecting to the State's comments on the nurse's testimony.

¶12 Turning to the State's comments on the victim's sexual history, Davis's motion identified two instances where the State's comments were potentially objectionable. In its opening statement, the State said: "[The victim] will tell you she never had boyfriends. She had not been sexually active. This was the first time she had ever had sexual contact, intercourse, penis to vagina and she still considered herself to be a virgin." In its closing argument, the State said:

> [W]hen you take into consideration her credibility, also remember the supporting evidence: the medial exam. There are hymenal tags in the vaginal opening of a 14 year old child. There is no evidence that she had boyfriends or that she was sexually active or sexually assaulted by anyone other than Mr. Davis. We know from [the nurse practitioner's] discussion about that medical evidence that something penetrated her vagina. Something penetrated her vagina.

In response, Davis's trial lawyer objected, stating: "Misstatement of the evidence." The trial court overruled the objection and said: "The jury is to use their own recollection."

¶13 Davis's postconviction motion claimed that the State's comments about the victim's lack of sexual experience violated the state's rape shield law, and he baldly asserted that the State's comments "inculcated the feeling that because [the victim] was a virgin she 'could not have been sexually assaulted by anyone other than Mr. Davis.'" Davis argued that the State's comments "'infected the trial with unfairness.'" (Citation omitted.)

¶14 On appeal, the State argues that to the extent any of the prosecutor's comments were improper, Davis has not demonstrated prejudice from his trial lawyer's failure to object to these statements, because the jury is presumed to have followed the circuit court's instruction that the parties' opening and closing statements are not evidence. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 701, 641 N.W.2d 490, 496 (jury is presumed to follow court's instructions). We agree with this analysis. The State's brief comments concerning the victim's sexual history were not evidence, and the victim ultimately did not testify about her sexual history or lack of boyfriends. It is pure speculation to suggest that the jury would have disregarded the circuit court's instruction and relied on the State's comments to support its verdicts. Further, we note that in the second instance, Davis's trial lawyer did in fact object, and the trial court told the jury to focus on the evidence. Finally, the postconviction motion's bald assertions about the potential effects of the State's comments are not persuasive. In sum, we are not convinced that Davis's motion demonstrated a reasonable probability that, but for his lawyer's alleged failure to object—or to object differently—the results

of the proceeding would have been different. *See* ***Love***, 2005 WI 116, ¶30, 284 Wis. 2d at 126, 700 N.W.2d at 70.

¶15 The second issue Davis's postconviction motion asserted was that his trial lawyer should have objected to the nurse practitioner's testimony that the victim had hymenal tags that were "consistent" with the victim's claim of having had "penis to vagina sexual intercourse" the previous year. Davis's postconviction motion argued that the testimony was "irrelevant" and did "not connect Davis to any crime." We conclude that the nurse practitioner's testimony was not objectionable or irrelevant, and that Davis's trial lawyer did not perform deficiently by not objecting to the testimony. Instead of objecting, Davis's trial lawyer attacked the credibility and weight of the evidence. For instance, the nurse practitioner testified that her observations were *consistent* with sexual intercourse in the past, but on cross-examination, Davis's trial lawyer elicited testimony that a "ruptured hymen is not indicative that sexual intercourse has occurred" and that the tearing could have occurred as late as one week before the exam, which was conducted nearly a year after the alleged assaults. Davis's postconviction motion did not demonstrate that his trial lawyer performed deficiently.

¶16 Davis's postconviction motion presented another argument concerning the nurse practitioner. He asserted that his trial lawyer should have "neutralize[d]" the nurse practitioner's testimony by asking her about testimony she gave at the first trial concerning an alternate cause of the victim's hymenal tags: tampons. The motion also argued that Davis's trial lawyer should have introduced testimony from another witness that the victim's inability to tolerate the use of a speculum during the sexual assault exam suggested that her allegations were not trustworthy.

¶17 We are not convinced that Davis's trial lawyer performed deficiently. As the circuit court noted, the nurse practitioner testified at the first trial that it was "possible" but doubtful that a tampon could have been the cause of the victim's hymenal tags. We fail to see how eliciting that same testimony would have advanced Davis's case. As for asking about the speculum, Davis's trial lawyer asked numerous questions about the nurse practitioner's inability to complete the exam. In closing, he argued that the nurse practitioner's testimony was "absolutely worthless" because she could say only that the hymenal tags were consistent with sexual intercourse, not that it certainly occurred. Davis has not demonstrated a deficiency in his trial lawyer's approach to these issues.

¶18 The fourth issue presented in Davis's postconviction motion was whether Davis's trial lawyer should have impeached the victim's testimony by eliciting testimony from her father that the victim denied that Davis "had ever done anything unusual to her," and by eliciting testimony from the victim's friend that the victim denied that Davis "ever did anything to her." (Two sets of quotation marks omitted.) We are not convinced that Davis was prejudiced by the lack of this testimony. As the circuit court noted when it denied Davis's postconviction motion, the victim testified that she told her father that she did not like Davis and admitted that she did not tell him about the abuse. Consistent with that testimony, the victim's father testified that his daughter did not tell him about the abuse. Thus, it was undisputed that the victim did not disclose the abuse to her father.[3]

[3] The victim ultimately disclosed the abuse to a school counselor, who notified the authorities and the victim's father.

¶19 As for Davis's trial lawyer's examination of the victim's friend, the postconviction motion asserts:

> [Davis's trial lawyer] did call [the victim's friend] to testify at trial … [h]owever, as a result of [the trial lawyer's] failure to ask one relevant question in regard to [the friend's] sworn statement – or anything of import and adverse to its case – the [S]tate declined cross examination of this witness.

The postconviction motion's discussion of the victim's friend's potential testimony is inadequate; it does not explain what questions should have been asked or how the answers would have affected the outcome of his case. Davis has not shown that his trial lawyer was deficient in his examination of the victim's friend or that Davis was prejudiced by any alleged deficiency.

¶20 The final argument raised in Davis's postconviction motion is that his trial lawyer should have introduced evidence from a psychologist that "Davis did not exhibit character traits consistent with a sexual disorder" and therefore was unlikely to have committed the crime. This evidence is known as ***Richard A.P.*** evidence. *See* ***State v. Richard A.P.***, 223 Wis. 2d 777, 790–795, 589 N.W.2d 674, 680-682 (Ct. App. 1998). In support, Davis attached to his postconviction motion an affidavit from a psychologist that includes the statement that Davis's clinical profile was "not consistent with expectations for sexual assault perpetrators."

¶21 On appeal, the State provides additional information about the statement that is crucial to our analysis. The psychologist's affidavit was "prepared for Davis's postconviction proceedings after his first trial and in support of his claim that his sentence was unduly harsh." The full paragraph from the psychologist's affidavit stated:

> In determining Mr. Davis'[s] prognosis in treatment, I view as significant that the charges in the instant case are the

> only allegations of sexual assault made against Mr. Davis. Consequently, as his clinical profile is not consistent with expectations for sexual assault perpetrators, the prognosis for treatment and ameliorating the behavior of concern is good.

Based on these facts, the State argues:

> This was not ***Richard A.P.*** evidence and trial counsel was not ineffective for failing to present it. [The psychologist] has never opined that Davis was unlikely to commit an assault because he lacked the characteristics of a typical sex offender. Instead, he said that the lack of such characteristics made Davis more amenable to treatment. [The psychologist] developed his opinion after Davis was initially convicted and thus, based it on the belief that he had committed a sex offense. Nothing indicates that [the psychologist] would have been willing to state at Davis's second trial that he was unlikely to commit a sex offense.

(Citations omitted; bolding added.)

¶22 We agree with the State. Davis's postconviction motion did not demonstrate that a psychologist was prepared to provide ***Richard A.P.*** evidence on his behalf. Accordingly, Davis's postconviction motion failed to prove that his trial lawyer provided constitutionally deficient representation by not attempting to call the psychologist as a witness.

By the Court.—Order affirmed.

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