

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 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. 2013AP842-CR

Cir. Ct. No. 2010CF000487

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LUIS A. GAMBOA,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Luis A. Gamboa appeals from a judgment of conviction, entered on a jury verdict, for one count of physical abuse of a child (recklessly causing great bodily harm), one count of neglecting a child resulting in great bodily harm, and one count of neglecting a child resulting in bodily harm,

contrary to WIS. STAT. §§ 948.03(3)(a), 948.21(1)(c), and 948.21(1)(b) (2009-10).¹ Gamboa also appeals from a trial court order denying his motion for resentencing or sentence modification. Gamboa argues that he is entitled to resentencing or sentence modification because his trial counsel provided deficient representation at sentencing and because the trial court erroneously exercised its discretion and violated Gamboa's due process rights by relying on "incorrect information" at sentencing. We affirm.

BACKGROUND

¶2 In 2010, Gamboa was charged with multiple felonies in connection with the alleged physical abuse of his son. According to the criminal complaint, sixteen-month-old E.G. was admitted to Children's Hospital with multiple injuries. The complaint indicated that Dr. Lynn Sheets had concluded that E.G. was "the victim of severe physical abuse including healing abusive fractures of at least two different ages and abusive head trauma." Dr. Sheets further concluded that E.G. had "at least seven, and up to eleven fractures of at least two different ages" and that "[t]he fractures are diagnostic for severe physical abuse of a child." Dr. Sheets said the injuries included: (1) a rib fracture that was estimated to be "less than four weeks old"; (2) complete fractures of the right tibia and fibula "that would have been excruciatingly painful"; (3) "metaphyseal fractures of the left wrist," a type of fracture that "generally occurs from a grab and twist to the extremity"; and (4) additional fractures to the hands and arm.

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

¶3 The complaint stated that Dr. Sheets had concluded that E.G. was also suffering from “wasting muscle/atrophy” and that his weight was the same as when he was nine months old. Dr. Sheets concluded that E.G. “is the victim of severe physical abuse ... with potentially life threatening injuries” and had “been severely medically neglected resulting in further serious harm to the child.”

¶4 Gamboa gave a statement to a detective that was summarized in the criminal complaint. Gamboa told the detective that about two months earlier, he got angry after E.G. fell down some stairs and he “grabbed E.G. and forcefully shook E.G. for ten to fifteen seconds,” during which Gamboa “realized that E.G.’s leg was broken because he could see that it was fractured into two pieces.” Gamboa told the detective “that he could not take E.G. to the hospital because nobody would believe ... that the broken leg and arm was caused by a fall down the stairs.”

¶5 The case proceeded to a jury trial on four counts. E.G. did not testify and did not present any witnesses. His defense was that he was not the only person who cared for E.G., that some of Gamboa’s actions were based on his ignorance of proper medical treatment, and that he ultimately did take E.G. to the doctor. The jury found E.G. guilty of: (1) physical abuse of a child—recklessly causing great bodily harm, a lesser-included offense; (2) one count of child neglect resulting in great bodily harm, which was based on medical neglect regarding E.G.’s broken leg; and (3) one count of child neglect resulting in bodily harm, related to allegations of nutritional neglect, which was a lesser-included offense. The jury found E.G. not guilty of another neglect charge.

¶6 A presentence investigation (PSI) was ordered. The PSI report noted that Gamboa was born in Mexico, never knew his father, and was abandoned by

his mother. The PSI report indicated that Gamboa “never attended school” and had a “very hard” life. The PSI report noted that Gamboa had one prior conviction for misdemeanor battery with use of a dangerous weapon based on a domestic incident with his wife, for which he received probation.

¶7 The PSI report also addressed Gamboa’s emotional and mental health, noting:

[Gamboa] recalled seeing a psychologist or psychiatrist while he was on probation supervision. He said that he does not believe he has any problems in this area and has never been prescribed medication.... [A] psychological evaluation was completed on the defendant ... on July 25, 2008. The evaluation was requested ... in order to assess [the] present level of psychological functioning ... and to provide treatment recommendations.

... [T]he report indicates that ... [t]here was no evidence of hallucinations or delusional thinking. There were no abnormal behavioral patterns. He denied suicidal and/or homicidal ideation.

¶8 The PSI report noted with respect to Gamboa’s physical health that he had been “diagnosed with lymphoma cancer and HIV in 2005.” The PSI report continued:

He reported that he spent six to seven months in chemotherapy and pointed out several scars from the chemotherapy on his body. The defendant said that at the end of 2007, he was informed that his cancer was in remission. He said he takes prescribed medication for his illness at the House of Correction. The defendant reported suffering from migraines, chronic diarrhea and hemorrhoid problems.

¶9 The defense prepared a sentencing memorandum that argued incarceration was not warranted because the general public was not at risk and Gamboa could receive “training in parenting skills” better through the children’s

court system than the prison system. The memorandum also “emphasize[d] that the jury did not find that Gamboa *intentionally* caused any injuries to [E.G.]”

¶10 At sentencing, the State urged the trial court to impose consecutive sentences totaling twelve years of initial confinement and five years of extended supervision, based on E.G.’s significant physical injuries, which the State argued were “intentionally inflicted.” E.G.’s foster mother and his guardian ad litem from a related CHIPS case also spoke about E.G.’s continuing physical challenges, including his need for brain surgeries and numerous other therapies. The guardian ad litem told the trial court that Gamboa’s actions were “a systematic, vicious and sadistic attack upon a baby.”

¶11 In contrast, trial counsel urged the trial court to impose and stay an eight-year sentence and place Gamboa on probation. He noted that Gamboa had only one prior misdemeanor conviction and he asserted that Gamboa should not be punished for his “ignorance” concerning proper parenting skills. Trial counsel also read a letter from Gamboa that had been translated into English, in which Gamboa blamed the injuries on his “ignorance” and offered “to take any programs offered by the community or Department of Corrections.”

¶12 The trial court followed the State’s recommendation and sentenced Gamboa to three consecutive sentences totaling twelve years of initial confinement and five years of extended supervision. In doing so, the trial court told Gamboa: “This was every child’s nightmare having you as a caregiver and having you as a parent. You have failed all that responsibility by your sadistic and horrific acts.”

¶13 Gamboa retained postconviction/appellate counsel and filed a motion for resentencing or sentence modification.² He argued that his trial counsel provided ineffective assistance by “fail[ing] to present to the sentencing court crucial information about how Mr. Gamboa’s own serious, life-threatening illnesses—cancer and HIV—affected his functioning and ability ‘reasonably’ to care for his son.” Gamboa further argued that the trial court violated his due process rights and erroneously exercised its sentencing discretion when it “sentenced him based on incorrect and incomplete information” supplied by the State and the guardian ad litem. For instance, Gamboa challenged statements by the guardian ad litem and the State suggesting that Gamboa had “‘sadistic’ tendencies” and had starved E.G.

¶14 The trial court denied the motion in a written order, without a hearing. It rejected Gamboa’s ineffective assistance claim, concluding:

Even if counsel had provided a more detailed account of the defendant’s medical circumstances, both prior to and at the time of the abuse, it would not have altered the court’s view of the severity of the offenses or mitigated the defendant’s culpability. The primary goals of the sentence were punishment, deterrence and protection of the victim. Additional information about the defendant’s medical circumstances would not have affected the court’s sentencing decision, and therefore, the defendant was not prejudiced by counsel’s failure to provide this information to the court at the time of sentencing.

¶15 The trial court also rejected Gamboa’s claims that he was sentenced based on inaccurate information. It explained:

² One section of the motion asked the trial court to vacate the DNA surcharge, which the trial court refused to do. Gamboa has not pursued that issue on appeal, so we will not discuss it.

[T]he court was presented with sufficient evidence about the victim’s injuries and how they were caused to make its findings about the nature of the defendant’s offenses and his role in them. The evidence showed that the defendant was engaged in a pattern of abusing his son over an extended period of time and that he failed to seek medical care for him. While the defendant attributes his behavior to his own ignorance based upon an abusive childhood and no formal education, as the court stated to the defendant at sentencing, “[T]his [case] goes beyond ignorance... [T]here is a significant lack of common decency.” ... The court’s conclusions, and sentencing decision, are amply supported by the record of this case.

(Second and third sets of brackets in original.) This appeal follows.

DISCUSSION

¶16 On appeal, Gamboa continues to argue that he is entitled to resentencing or sentencing modification because his trial counsel provided deficient representation at sentencing and because the trial court erroneously exercised its discretion and violated Gamboa’s due process rights by relying on “incorrect information” at sentencing. We consider each issue in turn.

¶17 We begin with Gamboa’s ineffective assistance claim. To prevail on an ineffective-assistance-of-counsel claim, “a defendant must demonstrate that (1) counsel’s performance was deficient, and (2) the deficiency was prejudicial.” *State v. Harbor*, 2011 WI 28, ¶67, 333 Wis. 2d 53, 797 N.W.2d 828 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). “We need not address both components of the inquiry if the defendant fails to make an adequate showing on one.” *Harbor*, 333 Wis. 2d 53, ¶67. On appeal, “[w]e will not disturb the [trial] court’s findings of fact unless they are clearly erroneous, but the ultimate determinations of whether an attorney’s performance fell below constitutional

standards and whether the defendant was prejudiced as a result are questions of law.” *Id.*, ¶34.

¶18 We conclude that Gamboa has not proven prejudice and, therefore, we do not address whether Gamboa’s trial counsel’s performance was deficient. *See id.*, ¶67. Gamboa’s postconviction motion alleged that trial counsel should have provided information about “Gamboa’s serious health conditions and their impact on his functioning at the relevant time.” In support of this argument, Gamboa cites statements he made during his interrogation. For instance, Gamboa told the detective that he gets frustrated with himself and “it is like a nervous breakdown.”³ Gamboa also said that he did not know if his medication was causing him to feel anxiety. In addition to citing his own statements about his health, Gamboa included in his postconviction motion a document outlining the general side effects of one of his medications, an intake screening form from the Department of Corrections indicating that Gamboa complained of bone and muscle aches and migraine headaches, and an emergency room report regarding a fever. Notably, Gamboa’s postconviction motion did not include a statement from a medical professional opining that Gamboa’s functioning and ability to care for children was impacted by his health conditions or medication.

¶19 Like the trial court, we conclude that Gamboa has failed to show that he was prejudiced when his trial counsel did not present to the trial court the information he submitted in his postconviction motion. That information does not demonstrate that Gamboa’s medical conditions impacted his functioning and

³ Gamboa does not speak English. He and the detective who interrogated him spoke in Spanish and the interrogation was translated into English.

ability to care for E.G. Further, Gamboa had an opportunity to tell the PSI writer about his mental and physical health and did not indicate that his functioning was impacted. Finally, it is clear from the trial court's sentencing comments that the primary sentencing goals were punishment, deterrence, and protection of E.G. Gamboa has not shown how any alleged physical and mental problems would mitigate the brutal behavior that the trial court sought to punish and deter. We agree with the trial court that Gamboa has not shown "that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" See *Harbor*, 333 Wis. 2d 53, ¶72 (citation omitted). Because Gamboa has not demonstrated prejudice, his ineffective-assistance-of-counsel claim fails.

¶20 Next, we consider Gamboa's claims that the trial court erroneously exercised its discretion and violated Gamboa's due process rights when it relied on "incorrect information not supported, but contradicted, by the facts in evidence and provided by the prosecution." (Uppercasing omitted.) Gamboa argues that the inaccurate information included: (1) assertions by the State and guardian ad litem that Gamboa was "a sadistic, methodical abuser and tormentor who totally withheld food, care and medical attention with the goal of destroying [E.G.]" and (2) trial counsel's suggestion that Gamboa was "generally healthy mentally and physically at the relevant time."⁴

⁴ The quoted language is Gamboa's summation of what was said at sentencing. Those precise phrases do not appear in the transcript, although the parties used some of those words.

¶21 In *State v. Tjepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, our supreme court summarized the law that applies when a defendant alleges he or she was sentenced based on inaccurate information:

We hold that in a motion for resentencing based on a [trial] court’s alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the [trial] court actually relied on the inaccurate information.... Only after the defendant meets this burden to show that the sentencing court actually relied on inaccurate information, does the burden then shift to the state to establish that the error was harmless.

Id., ¶31. Applying that standard here, we conclude Gamboa is not entitled to relief because he did not prove that the information offered at sentencing was inaccurate.

¶22 Specifically, the testimony of Dr. Sheets—which was consistent with her written report that was quoted in the criminal complaint—supports the statements made by the State, the guardian ad litem, and the trial court concerning Gamboa’s abuse of E.G. Gamboa’s trial counsel argued at sentencing that Gamboa’s actions demonstrated ignorance, rather than malicious behavior, but Sheets’s testimony, as well as Gamboa’s own confession, contradicted that assertion. Faced with contradicting assertions, the trial court was free to accept the State’s view of the evidence, which was supported by trial testimony. The inferences drawn by the trial court were a fair interpretation of Dr. Sheets’s testimony. Gamboa has not proven that the assertions made about his conduct were inaccurate.

¶23 In addition, as we have already concluded, Gamboa has not shown that the information provided about his general mental and physical health was inaccurate. His statements during his confession, the list of general side effects that can be caused by the medication he takes, and the intake forms from the

Department of Corrections and an emergency room do not establish that Gamboa's ability to function and care for E.G. were affected. Gamboa has not proven the inaccuracy of the information provided to the trial court concerning his physical and mental condition. Accordingly, his request for resentencing based on due process and the exercise of sentencing discretion was properly denied.

By the Court.—Judgment and order affirmed.

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

