COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1054-CR **Cir. Ct. No. 2011CF300**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LASHAWN E. GATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Lashawn E. Gates appeals from a judgment of conviction, entered on his guilty plea, for one count of soliciting a child for

prostitution, contrary to WIS. STAT. § 948.08 (2011–12).[1] He also appeals from an order denying his motion for resentencing. He argues that he is entitled to resentencing because: (1) the trial court relied on inaccurate information at sentencing; and (2) his trial lawyer provided constitutionally deficient representation at sentencing. We affirm.

BACKGROUND

¶2 The State filed a criminal complaint charging Gates with second-degree sexual assault of a child. The complaint alleged that Gates, who was eighteen years old, assaulted J.D., a fifteen-year-old girl who attended the same school. According to the criminal complaint, J.D. told the police that when she exited a city bus that she was riding home from school, Gates—whom she knows from school—"approached her and convinced her to walk and talk with [him]." After they walked behind a building, Gates kissed J.D. and pulled down her pants and underwear. He "started digging with his hand in her vagina," which caused her to suffer "swelling to her urethra" and "actively bleeding tears to her posterior fourchette." J.D. said Gates also put his penis "against her vaginal area" and eventually left. The complaint alleged that J.D. "did not agree to any sexual activity with the defendant."

¶3 J.D. did not testify at the preliminary hearing. Instead, the State presented brief testimony from J.D.'s mother, who said that J.D. told her that she had been sexually assaulted. The State also called a detective who interviewed Gates. The detective said Gates told her that when he was at school, he "saw

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

[J.D.] in the hallway and they went into a boy's room to smoke and then the next thing that happened is that they ended up in a bathroom stall and she pulled her pants down and he pulled his pants down and his penis touched her vagina." Based on this testimony—which the State acknowledged provided a different version of the facts than was alleged in the criminal complaint—Gates was bound over for trial.

¶4 Gates ultimately entered a plea bargain with the State, pursuant to which the charge was amended to soliciting a child for prostitution and the location of the crime was changed to the intersection where the school is located. At the plea hearing, a prosecutor who was unfamiliar with the case appeared on behalf of the State. He stated that based on his review of the offer letter, he believed that the State would recommend "that the Court impose but stay a sentence of four years [of initial] confinement and four years [of] extended supervision, [and] place Mr. Gates on probation for six years with conditions that he serve nine to 12 months at the House of Correction."

¶5 The trial court asked Gates's trial lawyer to confirm the accuracy of the State's recitation of the plea bargain. Gates's trial lawyer replied:

> Your Honor, very close to it and nothing that will get in the way. The negotiations were finalized that the State was going to recommend an imposed and stayed bifurcated sentence and probation and work release and was free to make whatever recommendation the State might want as far as length of time but then in the Court's discretion as to the various lengths and conditions.

The trial court confirmed with Gates that the State would be "free to argue what [the prosecutor] just put on the [R]ecord." Gates personally indicated that was his understanding.

¶6 Gates's trial lawyer then explained the factual basis for the plea:

> [A] supplement[al] report … has my client's confession. There's statements to the officers, and [the prosecutor handling the case] and I spoke and worked through it.
>
> And the factual basis comes largely from his interview with the police and what he confessed to…. [H]e met the fifteen-year-old girl on July 26th about 9:30 in the morning at … [s]chool; and the two of them, I guess, were in the hallway; and she wanted to borrow some money from him to see a play at the school, about $5.[2] He agreed to loan it to her in exchange for oral sex.
>
> The two of them went into the boy's bathroom and began the situation, if you will, when two others came in and interrupted them; and then they stopped … and that's what he confessed to right from the beginning; and that's what's contained in the supplement[al] report; and so that would be the … factual basis for the plea.

¶7 During the plea colloquy, the trial court asked Gates if he had read and understood the criminal complaint. Gates said he had read it, but "disagree[s] with it." The trial court then confirmed that Gates had gone over his statement to the police with his trial lawyer, which was "the statement that's being relied on for the plea here." Gates agreed that the crime to which he was pleading guilty was soliciting oral sex from a child under the age of eighteen in exchange for something of value.

¶8 At sentencing, the prosecutor who negotiated the plea bargain with Gates appeared for the State. The State recommended an imposed and stayed sentence of four years of initial confinement and four years of extended supervision, plus six years of probation with nine to twelve months of condition time at the House of Correction.

[2] Gates's trial lawyer subsequently clarified it was "more like $8."

¶9 The State then explained that both Gates and J.D. had told the police multiple versions of what happened. The State said:

> There is some element of complexity here because there is some confusion about exactly what happened, and so I'm just going to sort of share these differing versions here.
>
> Mr. Gates initially denied having any kind of contact with the victim in this case; and then later on at the police department, he made a statement that said that he was at the school and that he didn't do anything to her. He only had contact with her at the school, that she approached him and asked him for some money because she wanted to attend a play or something. They were standing outside of the boys[']' bathroom. They went into the boy[s'] bathroom together into one of the stalls.
>
> He said nothing happened because two boys came into the bathroom. He doesn't know why she was saying anything happened but maybe she was embarrassed.
>
> Ultimately Mr. Gates admitted that there was sexual contact between the two of them that occurred in the bathroom stall.

¶10 The State said that J.D. initially told the police that something happened to her at school after she missed the bus. The State continued:

> [She said s]he was pulled into the boy[s'] bathroom from behind by two unknown assailants.
>
> She was held by this person and then there was finger to vagina penetration and there was also contact with her external genitals and this person's penis….
>
> … [T]his child had some significant medical injury here to her paraurethral tissue. She had gross swelling….
>
> Then there was also a fresh jagged tear at six o'clock, [and] a three-quarter centimeter fresh jagged tear at six o'clock. Two of them. Both the tears had active bleeding when they were touched.
>
> And that would be very consistent with rough finger to vagina contact because of the fingernails.

¶11 The State said that the victim later told a second version of the crime in which she took the bus from school and was approached by Gates after she got off the bus.[3] J.D. told the police that Gates "got her from behind and had her go by these dumpsters" and then pulled down her pants and, as she was struggling, "shoved his fingers into her vagina and was rubbing his penis against her vagina."

¶12 The State said that after reviewing the victim's conflicting statements, it was "very unclear … which of these two things happened." The State explained: "[H]er original story was very consistent with what the defendant said except there was force[] used in her version of the story and injuries that she sustained would tend to be more consistent with that." The State concluded:

> [O]nce the report of the sexual assault in terms of the activity was similar among all of her versions, it's just a question of where this happened. So that's how we ended up where we were with the plea with the exchange of money and the sex acts [which] fit the perimeters of [WIS. STAT. §] 948.08.

¶13 Gates's trial lawyer told the trial court that "this is pretty much a joint recommendation," although he questioned whether six years of probation was too long. He also asked the trial court to waive the requirement that Gates register as a sex offender for fifteen years, citing WIS. STAT. § 301.45(1m), a statute which gives trial courts the discretion to waive registration requirements in some cases.

¶14 Gates personally addressed the trial court. He admitted that he offered J.D. cash in exchange for sexual activity after she approached him for a loan, but he said he should not be considered a sex offender. He explained: "I do

[3] This was the version of the crime that was alleged in the original criminal complaint.

take responsibility because I shouldn't have been in the restroom … with a younger female…. [B]ut I'm not a rapist."

¶15 When it pronounced sentence, the trial court addressed the facts. It said that it had accepted the amendment of the charge "given the facts as related by Mr. Gates" and that "soliciting a child for prostitution was appropriate relying on those facts." The trial court said that it did not "know why the victim here gave the two locations," and that it was the version of events offered by Gates "that forms the basis for the plea[:] that this was an offer of money for a sexual act that the victim would then perform."

¶16 The trial court also found that the assault "went beyond" what Gates said, based on "the injury caused to the victim." The trial court said it accepted the State's explanation that the victim's injuries were caused by finger-to-vagina contact. The trial court added: "[I]t shows a certain level of force even if there was a willingness in the first place on the part of this victim[;] that force was used to hurt her…. So I believe that whatever it started out as … it went beyond that."

¶17 The trial court also said that it did not "know if there was more than one person involved," because J.D. "related at first there was." The trial court said: "That would have made it more aggravated in terms of her ability to say no or to get away. But I don't know those things. So I have to base it on what I know."

¶18 The trial court followed the parties' recommendation and imposed and stayed a sentence of four years of initial confinement and four years of extended supervision. It placed Gates on probation for five years, which was slightly more than Gates had recommended and slightly less than the State had recommended. It also ordered Gates to serve ten months in the House of

Correction. Finally, the trial court declined to exempt Gates from the requirement that he register as a sex offender for fifteen years.

¶19 After sentencing, a new lawyer was appointed for Gates and he filed a postconviction motion seeking sentence modification or resentencing.[4] He specifically asked "for a reduction in initial confinement and supervision, and to be exempted from the requirement that he register as a sex offender." He argued that at sentencing, the trial court "was not informed of inconsistencies in the victim's accounts of events, the presentation of which should have prevented the court from assuming that, despite the reduction in charge, there was a basis to assume Gates committed sexual assault." The postconviction motion complained that the State referenced two scenarios offered by the victim, but there was actually a third scenario. Specifically, J.D. told the police first that two unknown men attacked her in a bathroom at school. Second, she told the police that two unknown men attacked her after she exited the bus. Third, she said that Gates assaulted her after she exited the bus. The trial court was not told about the second scenario. Gates also asserted that the trial court should have been told: (1) that "J.D.'s parents apparently suspected that J.D. was missing during the time of the alleged activities because she was with her boyfriend (with whom she could have had sexual contact, including contact resulting in vaginal injury)"; and (2) that one police report stated: "This is a baseless sex[ua]l assault." (Some capitalization omitted.)

[4] On appeal, Gates states that he is not pursuing his argument that he is entitled to sentence modification based on a new factor or the trial court's "inherent authority to modify sentence." Therefore, we do not discuss the arguments he made on those issues or how the trial court addressed them. ***Reiman Assoc., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not argued or briefed are deemed abandoned).

¶20 The second basis for relief alleged in Gates's postconviction motion was that he received constitutionally deficient representation from his trial lawyer at sentencing. He argued that his trial lawyer "should have recognized the significance of the mitigating information that J.D. presented three, not two versions[;] plainly and admittedly lied[;] might have been with, and injured by, her boyfriend[;] and was not forcibly assaulted by Mr. Gates." He also argued that his trial lawyer "should have interrupted when the court made assumptions that he caused J.D.'s injuries, committed sexual assault, and might have acted with others." Gates contended that as a result of his trial lawyer's constitutionally deficient performance, the trial court "was misled (and perhaps independently jumped to conclusions), and it erroneously assumed causation of injuries and the commission of a forcible sexual assault when it imposed the sentence."

¶21 The trial court denied the motion in a written order, without a hearing. After summarizing the information presented at sentencing, the trial court addressed the allegation "that trial counsel failed to point out that the victim had given *three* different versions of what occurred." The trial court stated:

> Although the court referenced two different stories from the victim, rather than the three that existed, the court nevertheless understood that various versions had been given by the victim, that multiple (and serious) inconsistencies were present in her description of events, and that the State's basis for amending the charge was the defendant's own statement of sexual contact in the bathroom. The fact that there were three different versions given by the victim does not warrant modification. The court already knew of the serious inconsistencies in the victim's version of events, and a third version would not have altered the court's assessment of the defendant's conduct to which he admitted.

(Record citation omitted.)

¶22 The trial court also recognized that Gates had the option to go to trial, at which he could have highlighted inconsistencies in J.D.'s stories and could have asserted that J.D. lied to cover up having spent time with her boyfriend. The trial court said that Gates chose instead to plead guilty to a reduced charge and admit the sexual contact. The trial court said that because Gates pled guilty, the trial court "was entitled to consider what had happened to the victim as a result of the sexual contact she had with the defendant," and that the trial court "could infer that he had fingered her vagina and caused tears to it by rough handling." The trial court concluded that Gates's trial lawyer "was not ineffective for failing to object to the court's consideration of any of these factors because the court … had the right to consider them as part of the defendant's conduct in this case and overall character." The trial court denied the motion in its entirety.

DISCUSSION

¶23 Gates's first argument is that he was sentenced based on the following inaccurate information: "the unjustifiable conclusion that Mr. Gates caused J.D.'s injuries, and the unjustifiable conclusion that he might have done so with an accomplice." He argues that he is entitled to resentencing because "both parties encouraged [the trial court] to accept those unreliable assumptions." (Some capitalization omitted.)

¶24 "A defendant has a … due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3. To achieve resentencing, "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." ***Id.***, 2006 WI 66, ¶31, 291 Wis. 2d at 195, 717 N.W.2d at 9. Where, as here, the trial lawyer does not

object to the information provided by the State or to the trial court's findings, the defendant has forfeited his right to review other than in an ineffective-assistance-of-counsel context. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 677, 683 N.W.2d 31, 41–42.

¶25 Gates acknowledges the "'normal procedure,' in which reviewing courts prefer [applying an] ineffectiveness analysis." *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749, 754 (1999) ("[T]he normal procedure in criminal cases is to address waiver within the rubric of the ineffective assistance of counsel."). Nonetheless, Gates argues that this court has the "authority to order resentencing without regard to ineffective assistance of counsel," and he urges this court to order resentencing "without the need for an evidentiary hearing on Mr. Gates'[s] alternative claim of ineffective assistance of counsel."

¶26 In response, the State argues that "[a]lthough Gates makes general policy arguments against application of the rule of forfeiture in the review of inaccurate-information sentencing claims, he offers no compelling reason why forfeiture should be ignored in his case." (Brief citation omitted.) We agree. We will apply the general rule. *See* ***Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d at 677, 683 N.W.2d at 41–42 ("The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'") (quoting ***Erickson***, 227 Wis. 2d at 766, 596 N.W.2d at 754).

¶27 We follow the familiar two-part analysis for claims that a lawyer provided constitutionally deficient representation, which was established in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under this framework, Gates must demonstrate that his trial lawyer's representation was deficient and

"that this deficiency prejudiced him so that there is a 'probability sufficient to undermine the confidence in the outcome' of the case." *See* ***Erickson***, 227 Wis. 2d at 768, 596 N.W.2d at 755 (quoting ***Strickland***, 466 U.S. at 694). We need not consider both prongs "if the defendant makes an insufficient showing on one." ***Strickland***, 466 U.S. at 697.

¶28 Appellate review of a claim that a lawyer provided constitutionally deficient representation is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633–634, 369 N.W.2d 711, 714 (1985). We will not disturb the trial court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether Gates's lawyer's performance fell below the constitutional minimum is a question of law we review independently. *See* ***id.*** at 634, 369 N.W.2d at 714–715.

¶29 In this case, the trial court denied Gates's postconviction motion without an evidentiary hearing. Whether a postconviction motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her claim that a lawyer provided constitutionally deficient representation is a question of law that appellate courts review *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 369, 805 N.W.2d 334, 339. ***Balliette*** explained:

> If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the [trial] court must hold an evidentiary hearing. However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the [trial] court.

Id., 2011 WI 79, ¶18, 336 Wis. 2d at 369–370, 805 N.W.2d at 339 (internal citations and quoted sources omitted).

¶30 With those standards in mind, we begin our consideration of whether the trial court erroneously exercised its discretion when it denied Gates's motion for resentencing without a hearing. As noted above, Gates's motion alleged that his trial lawyer performed deficiently because he failed to recognize the significance of J.D.'s presentation of three, rather than two, versions of the crime, and failed to object when the trial court "made assumptions that [Gates] caused J.D.'s injuries, committed sexual assault, and may have acted with others."

¶31 The State argues that even if we assume for the sake of argument that Gates's trial lawyer's performance was deficient, "Gates has failed to demonstrate that [his lawyer's] errors were prejudicial." We agree that the prejudice prong of the ***Strickland*** test is dispositive. Gates's motion did not adequately allege or demonstrate that he was prejudiced by his trial lawyer's alleged deficiencies and, therefore, the trial court did not erroneously exercise its discretion when it denied Gates's motion without a hearing. *See* ***Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d at 369–370, 805 N.W.2d at 339.

¶32 Gates argues generally that the information allegedly "withheld from the [trial] court" and the allegedly erroneous information given to the trial court resulted in prejudice. He adds: "At a minimum, there is a reasonable probability the court would have granted Mr. Gates' motion to be exempt from the requirement that, for 15 years, he must register as a sex offender."

¶33 The State's appellate brief points out that the trial court lacked authority to exempt Gates from the reporting requirement because his crime is not one of those for which an exemption can be granted pursuant to WIS. STAT.

§ 301.45(1m). In his reply brief, Gates concedes that the trial court could not have granted the exemption under that statute.[5] Thus, Gates cannot demonstrate that he suffered prejudice with respect to the trial court's refusal to exempt him from the sex offender reporting requirement.

¶34 Gates does not identify any other specific ways he was prejudiced, relying instead on his conclusory assertion that the proceeding's result would have been different. This general assertion is unpersuasive. Gates received the prison sentence he asked for: four years of initial confinement and four years of extended supervision, imposed and stayed in favor of probation.[6]

¶35 To the extent Gates believes that the trial court would have imposed a shorter sentence than he requested if the trial court had not made "unreliable assumptions" that Gates injured J.D. and might have acted with accomplices, the Record does not support his belief. The trial court at sentencing explicitly said that while it was possible Gates acted with accomplices, it did not know for sure and, therefore, it would base the sentence "on what I know." Also, Gates has not

[5] Having now recognized that WIS. STAT. § 301.45(1m) does not offer the possibility of exemption from sex offender reporting requirements for those convicted of soliciting a child for prostitution, Gates argues in his reply brief that if this court were to order resentencing, the trial court could potentially grant an exemption from reporting requirements pursuant to WIS. STAT. § 973.048(2m). The trial court was never asked to consider granting an exemption under that statute and Gates's opening brief did not mention it. We decline to discuss whether an exemption was potentially available to Gates under § 973.048(2m) where it was unavailable under § 301.45(1m), because that issue was raised for the first time on appeal, in the reply brief. *See* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 245, 744 N.W.2d 889, 895 ("We generally do not review an issue raised for the first time on appeal."); ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989) (court does not generally "consider arguments raised for the first time in a reply brief").

[6] The Record indicates that Gates's probation was revoked about fourteen months after he was sentenced, before he filed his postconviction motion. In his postconviction motion, he sought "a reduction in initial confinement and supervision" and did not seek any adjustment of the length and conditions of probation.

produced evidence that J.D.'s injuries were *not* caused by the sexual contact with Gates, which was the trial court's finding based on information provided by Gates and the victim. The trial court's refusal to provide Gates relief from his sentence demonstrates that the trial court implicitly rejected Gates's argument that if the trial court had been aware of the additional information he provided in his postconviction motion, it would not have concluded that the sexual contact with Gates caused J.D.'s injuries.

¶36 Gates did not adequately allege or demonstrate that he was prejudiced by his trial lawyer's alleged deficiencies and, therefore, he was not entitled to an evidentiary hearing or relief. We affirm the judgment and the order denying his postconviction motion.

By the Court.—Judgment and order affirmed.

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