COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP290 **Cir. Ct. No. 1998CF480**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONNIE L. FAMOUS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Ronnie L. Famous appeals from an order denying his WIS. STAT. § 974.06 (2013-14)[1] postconviction motion for a new trial on grounds including ineffective assistance of counsel, newly discovered evidence, and failure to try the controversy fully. We reject Famous's contentions with the exception that, as the State concedes, he is entitled to an evidentiary hearing on whether postconviction counsel was ineffective for failing to raise the ineffective assistance of trial counsel who did not call two witnesses to testify on Famous's behalf. Thus, we reverse in part and remand for an evidentiary hearing on that claim, but otherwise affirm.

¶2 In 1998, Famous was convicted of four counts of first-degree sexual assault of a child, and one count of exposing a child to harmful material. Following his conviction, Famous moved for postconviction relief and, upon the denial of his motion, appealed to this court, which affirmed the judgment and the order. ***State v. Famous***, No. 2000AP422-CR, unpublished slip op. (WI App Sept. 19, 2001). In pertinent part, we rejected Famous's argument that the trial court erroneously exercised its discretion by admitting into evidence a sexually explicit videotape he showed the victim and by permitting a police investigator to testify as to the effects of showing sexually explicit material to children. ***Id.***, ¶¶25, 30.

¶3 In August 2013, Famous, pro se, filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06, alleging that postconviction counsel was ineffective for failing to argue that Famous's trial counsel was ineffective in the

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

following ways: (1) failing to present evidence that the victim had previously made a false accusation of sexual contact, (2) failing to object to the testimony of the State's expert witness or procure a defense expert, (3) failing to present medical evidence that Famous was impotent at the time of the offense, (4) failing to present two fact witnesses to refute the victim's testimony, (5) failing to object to the trial court's use of numbers for the jurors rather than their names, and (6) failing to challenge the prosecutor's discussion of the victim's credibility in her closing argument. In addition, Famous argued that he was entitled to a new trial based on newly discovered evidence in the form of recantation. He also contended that the controversy was not fully tried.[2]

¶4 In an order dated January 21, 2014, the trial court denied Famous's motion.

¶5 A defendant is not automatically entitled to an evidentiary hearing on postconviction claims. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). A trial court is required to conduct a hearing only when the defendant alleges sufficient material facts that, if true, entitle the defendant to relief. ***Id.*** at 310-11. If the defendant does not raise sufficient facts, if the allegations are merely conclusory, or if the record conclusively shows the defendant is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. ***Id.*** at 309-10. Whether a postconviction motion alleges sufficient facts to warrant an evidentiary hearing is a legal issue that we review independently. ***Id.*** at 310.

[2] On appeal, with two exceptions, the State acknowledges that Famous's claims of ineffective assistance are directed towards postconviction counsel.

¶6 To establish a claim of ineffective assistance of counsel, 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). To prove deficient performance, a defendant must identify specific acts or omissions of counsel that "were outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. Therefore, where, as here, a defendant alleges that postconviction counsel was ineffective by failing to conduct an adequate challenge to the effectiveness of trial counsel, the defendant cannot prevail without establishing that trial counsel was, in fact, ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶7 Initially, with the exception of Famous's first and fourth claims of ineffective assistance of counsel, all of his remaining claims of ineffective assistance are barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because he has not provided a sufficient reason for failing to raise them in his direct appeal or prior postconviction motion. Specifically, he has failed to allege how postconviction counsel's performance was deficient, much less how these claims were "clearly stronger." ***State v. Romero-Georgana***, 2014 WI 83, ¶¶73-74, 360 Wis. 2d 522, 849 N.W.2d 668. Although, "[i]n some instances, the ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal," ***id.***, ¶36, Famous "needed to do more than point to issues that

postconviction counsel did not raise," ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334.

¶8 Moreover, to show that trial counsel was ineffective, Famous needed to provide sufficient material facts, that is, the who, what, where, when, why and how. ***State v. Allen***, 2004 WI 106, ¶36, 274 Wis. 2d 568, 682 N.W.2d 433.

¶9 Famous's first claim of ineffective assistance is based on trial counsel's failure to present testimony that the victim had allegedly made a false accusation of sexual contact with a relative to her mother and aunt. The aunt then relayed this information to Famous who told trial counsel, but trial counsel did not act on it. Famous, however, has not set forth "sufficient material facts," such as who was the alleged perpetrator, when the sexual contact occurred, or any of its details, so as to permit us "to meaningfully assess [his] claim." ***Id.***, ¶¶21, 23 (citation omitted). Moreover, Famous has failed to demonstrate that this alleged evidence of "prior untruthful allegations of sexual assault made by the complaining witness" would have been admissible under WIS. STAT. § 972.11(2)(b)3., since he did not "establish some factual basis … to support a reasonable person's finding that the complainant made prior untruthful allegations." ***State v. DeSantis***, 155 Wis. 2d 774, 787-88, 456 N.W.2d 600 (1990).

¶10 Famous's second claim of ineffective assistance is that trial counsel should have objected to the admission of the testimony of the State's expert witness as irrelevant and prejudicial because the factual premise of the expert's testimony—that Famous showed the victim a pornographic video—was not proven. In addition, Famous argues that counsel should have called an expert witness on his behalf to counter the testimony of the State's expert. On direct

appeal, Famous previously argued that the testimony of the State's expert witness was irrelevant because it did not bear on the element of consent, which we rejected. ***Famous***, No. 2000AP422-CR, unpublished slip op. ¶¶27-30. Since the matter was litigated, it may not be relitigated, "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). In any event, on the prior appeal, we determined that "the evidence at trial was sufficient to permit the jury to find that Famous showed a sexually explicit video" to the victim. ***Famous***, No. 2000AP422-CR, unpublished slip op. ¶30. As for the failure to call an expert witness on Famous's behalf, while Famous referred to a "Dr. Stonefield" in his motion papers, a name he apparently obtained from the case of ***State v. St. George***, 2002 WI 50, ¶30, 252 Wis. 2d 499, 643 N.W.2d 777, he offered nothing to suggest that this expert witness would have testified in support of his theory that the techniques the police used to interview the victim were suggestive. *See* ***State v. Latorre***, No. 2012AP1752, unpublished slip op. ¶¶21-25 (WI App Aug. 27, 2013).

¶11 Famous's third claim of ineffective assistance is that his chiropractic records show that he was impotent at the time of the sexual contact as the result of a car accident and that his trial attorney should have presented this evidence to the jury. The only support for Famous's claim is a patient questionnaire dated October 22, 1997, which asks, "Do you have normal sexual function?" after which the "no" box is checked. This evidence is insufficient to support Famous's claim that he was impotent. Further, Famous's treatment with his chiropractor lasted only until March 24, 1998, which predates by approximately six weeks the date of the offense. Finally, Famous's evidence contradicts his own testimony at trial that he regularly engaged in sexual intercourse with the victim's mother from May 1997 to the time of the offense.

¶12 Famous's fourth claim of ineffective assistance is that his trial attorney failed to present the testimony of two witnesses who would have refuted the victim's testimony.[3] More specifically, according to signed "declaration[s]," these witnesses would have testified that the victim was with one of them in the living room watching television from the time the victim's mother left until the victim went home. In addition, they would have testified that Famous never moved the television and VCR from the living room into his room where, the victim claimed, he showed her the pornographic video and sexually assaulted her. The witnesses had planned on testifying, but, when they appeared, Famous's attorney told them that their testimony would hurt Famous and that counsel would not call them as witnesses. Later, however, Famous related to the witnesses that his attorney told him that they did not testify because they refused. Famous asserted that his attorney lied to him about the witnesses in retaliation for seeking to have counsel discharged during trial because he was ineffective. Based on the foregoing, the State concedes that Famous is entitled to a ***Machner*** hearing on this claim, and we agree. ***State v. Machner***, 92 Wis. 2d 797, 801, 804, 285 N.W.2d 905 (Ct. App. 1979); *see* ***State v. Jenkins***, 2014 WI 59, ¶¶41-48, 355 Wis. 2d 180, 848 N.W.2d 786. The allegations are detailed and not conclusory. If the jury had heard the witnesses' testimony and believed it, it would have impeached the State's case. *See* ***Jenkins***, 355 Wis. 2d 180, ¶42. Assuming trial counsel's refusal to call these witnesses was in retaliation for Famous having sought counsel's discharge, as opposed to part of a reasonable trial strategy, and Famous was

[3] The trial court denied this claim on the basis that it was barred by the doctrine of laches. As the State notes, however, laches does not apply to a motion made pursuant to WIS. STAT. § 974.06. *See* ***State v. Evans***, 2004 WI 84, ¶35, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900.

prejudiced, then counsel's failure would rise to the level of constitutionally ineffective assistance. *See* ***id.***, ¶67; ***Allen***, 274 Wis. 2d 568, ¶¶8-9. Although Famous previously moved for postconviction relief, his failure to raise this claim then is not procedurally barred from review under ***Escalona-Naranjo***, 185 Wis. 2d at 185, as he has alleged a sufficient reason for that failure, namely, that he brought this claim to postconviction counsel's attention, but counsel did not raise it, allegedly making his assistance ineffective. ***Romero-Georgana***, 360 Wis. 2d 122, ¶35; ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). Accordingly, Famous is entitled to an evidentiary hearing on this claim.

¶13 Famous's fifth claim of ineffective assistance is that trial counsel should have objected to the trial court's use of numbers for the jurors rather than their names. Where, as here, a "numbers" jury is used, "an individualized determination that the jurors needed protection based on the specific circumstances present in" the case must be made, and the trial court must "take necessary precautions to minimize any prejudicial effect to" the defendant. ***State v. Tucker***, 2003 WI 12, ¶¶21, 23, 259 Wis. 2d 484, 657 N.W.2d 374. The trial court did not follow this procedure. Nevertheless, the error was harmless and Famous was not prejudiced by it. ***Id.***, ¶27; *see* ***State v. Eison***, 2011 WI App 52, ¶11, 332 Wis. 2d 331, 797 N.W.2d 890 (noting that the harmless error test is essentially consistent with the test for prejudice in an ineffective assistance of counsel claim). Famous's allegation that the use of numbers gave the jury the impression that he was "dangerous and a threat" to them so as to raise a "reasonable probability" that had the proper procedure been followed he would have been acquitted is conclusory and speculative. *See* ***State v. Harvey***, 2002 WI 93, ¶41, 254 Wis. 2d 442, 647 N.W.2d 189.

¶14 Famous's sixth and final claim of ineffective assistance is that trial counsel should have objected to comments the prosecutor made in her closing argument about the victim's credibility. But, the comments Famous challenges were appropriate because they derived from the evidence. ***State v. Lammers***, 2009 WI App 136, ¶24, 321 Wis. 2d 376, 773 N.W.2d 463. Thus, any objection from trial counsel would have failed and postconviction counsel was not ineffective for foregoing such a claim. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

¶15 Famous additionally argues that his appellate lawyer provided ineffective assistance because he did not challenge the trial court's denial of Famous's midtrial request to represent himself and should have advanced arguments for excluding the pornographic video other than those raised on direct appeal. However, because Famous previously filed a ***Knight*** petition alleging ineffective assistance of appellate counsel, which we rejected on the merits, and has not provided a sufficient reason for failing to raise these claims in that petition, he is foreclosed from raising them now. *See* ***State ex rel. Schmidt v. Cooke***, 180 Wis. 2d 187, 189-90, 509 N.W.2d 96 (Ct. App. 1993).

¶16 Next Famous argues that he is entitled to a new trial because of newly discovered evidence showing that the victim subsequently recanted the accusations she made against him. In order to secure a new trial based on newly discovered evidence, the defendant must show "that '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citations omitted). When the newly discovered evidence is a recantation, the defendant must also satisfy another requirement: "recantation

testimony must be corroborated by other newly discovered evidence." ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997). This additional proof for recantation evidence is required because of its inherent unreliability. ***Id.*** The corroboration requirement is met if "there is a feasible motive for the initial false statement," and "there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78. Here, Famous has failed to provide sufficient evidence to corroborate hearsay statements the victim allegedly made to Famous's brother and her aunt recanting her accusations against Famous. The victim allegedly recanted in 1999, but her aunt and Famous's brother did not sign statements recounting her recantation until 2001 and 2005, respectively. Famous offers no feasible motive as to why the ten-year-old victim would testify falsely at trial, and there are no circumstantial guarantees that this hearsay evidence of recantation is trustworthy. ***Id.***

¶17 Famous contends that the controversy was not fully tried, but his contention is merely a reiteration of claims already raised, which, with the exception of his fourth claim of ineffective assistance of counsel, we have rejected. *See* ***State v. Avery***, 2013 WI 13, ¶¶38, 57, 345 Wis. 2d 407, 826 N.W.2d 60; ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

¶18 We reject Famous's remaining contentions.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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