COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2591-CR **Cir. Ct. No. 2011CF615**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHEVEA D. FOSTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN and DANIEL L. KONKOL, Judges. *Affirmed.*

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

¶1 PER CURIAM. Chevea D. Foster appeals from a judgment of conviction, entered upon a jury's verdict, for one count of attempted armed robbery with the use of force and one count of first-degree sexual assault with a

dangerous weapon. Foster also appeals a circuit court order denying his postconviction motion without a hearing.[1] Foster contends he received ineffective assistance from trial counsel. We disagree and affirm.

¶2 Around midnight on August 25, 2010, Mario Burks called S.H. and asked if she wanted to come over. S.H. left her home and began walking to Burks' home, just a few blocks away. As she was walking, a man approached her from behind. He pressed an object into her back and forced her behind a house. He first felt her pockets, threatening to kill S.H. if she "ain't got nothing." She told him she did not have anything and asked him to let her go. Instead, he told her to pull down her pants. S.H. complied, and her assailant licked her vagina before forcing her to perform oral sex on him. He ejaculated into her mouth then fled the scene. S.H. ran to Burks' home and reported that she had just been raped. Foster was identified through DNA recovered from S.H.'s clothing and from behind the house where S.H. had been assaulted. He was charged with attempted armed robbery with the use of force and first-degree sexual assault with a dangerous weapon.

¶3 At trial, Foster testified he had met S.H. on a "chat line" about two weeks before August 25, 2010. He said he left his home around 11:30 p.m. on August 25 to meet S.H., who had agreed to give him a "blow job" for $30. He denied having a gun and claimed she fabricated the sexual assault because he left without paying her.

[1] The Honorable Jeffrey A. Conen presided over the trial and imposed sentence; the Honorable Daniel L. Konkol denied the postconviction motion.

¶4 S.H. first testified during the State's case-in-chief. She claimed Burks was an old friend, but on cross-examination, she was asked about whether she had actually met Burks through a chat line. S.H. denied meeting Burks online or having online contact with him. She also testified that she thought the silver object Foster had was a gun, but she acknowledged that she never actually saw a gun. On rebuttal, S.H. acknowledged using chat lines for fun but denied meeting any men from the lines and denied having been on a chat line prior to leaving her home on August 25.

¶5 The jury convicted Foster on both counts. The circuit court sentenced him to five years' initial confinement and five years' extended supervision for the robbery, plus a concurrent fifteen years' initial confinement and ten years' extended supervision for the sexual assault. Foster appealed, and a no-merit report was rejected.

¶6 Following remand, Foster moved for postconviction relief, arguing ineffective assistance of trial counsel for failing to call Burks as a witness, failing to impeach the victim about whether she had seen a gun, and committing a series of other errors. After briefing, the circuit court denied the postconviction motion without a hearing. Foster appeals.

¶7 There can be no finding of ineffective assistance of trial counsel without a hearing to preserve the attorney's testimony. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998); ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Thus, the question is whether Foster's postconviction motion was sufficient to entitle him to a hearing. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. Sufficiency of the motion is a question of law; the motion must allege sufficient material facts that, if

true, entitle Foster to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. A sufficiently pled motion requires a hearing. *See* ***id.*** If a postconviction motion does not allege sufficient facts or is conclusive, or if the record conclusively demonstrates that the movant is not entitled to relief, then the circuit court may, in its discretion, choose to grant or deny a hearing. *See* ***id.***

¶8 To evaluate the sufficiency of Foster's motion, we must consider his ineffective assistance claims relative to the above-noted pleading standard. *See* ***Balliette***, 336 Wis. 2d 358, ¶20. Whether a defendant received ineffective assistance is a two-part inquiry. *See* ***State v. Carter***, 2010 WI 40, ¶21, 324 Wis. 2d 640, 782 N.W.2d 695. The defendant must show both that counsel performed deficiently and that the deficiency was prejudicial. *See* ***id.***

¶9 To show deficient performance, a defendant must show that counsel's performance fell below an objective standard for reasonableness. *See* ***id.***, ¶22. Great care must be taken to avoid "'the distorting effects of hindsight[.]'" *See* ***id.*** (citation omitted). To show prejudice from deficient performance, a defendant must show "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.'" ***Id.***, ¶37 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). We examine the totality of the circumstances to determine whether counsel's errors deprived the defendant of a fair trial. *See* ***State v. Domke***, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364. The question is whether there is a reasonable probability that, absent the errors, there would be a reasonable doubt about guilt, not whether the errors merely had some conceivable effect. *See* ***id.***

¶10 Foster first alleges that trial counsel was ineffective for failing to call Burks as a witness. Foster claims Burks would have impeached S.H. regarding

her use of chat lines by testifying he had met S.H. that way rather than being old friends as she told police. Because Burks also told the defense investigator that he expected his encounter with S.H. would end with sex, Foster claims his testimony would not only undermine S.H.'s credibility but bolster Foster's, because Burks' testimony makes it more likely that Foster's version of events was true.

¶11 The circuit court concluded that even if Burks' testimony were admissible, it would not have significantly aided Foster. At best, it corroborated Foster's claim he met S.H. on a chat line—while Burks thought his meeting with S.H. would end with sex, he said nothing about sex for money. Further, Burks actually corroborated more of S.H.'s report to police than he contradicted, including that they had met before August 25, 2010, that they planned to meet that night, and that S.H. immediately reported the assault to him.

¶12 The State also points out that Burks' testimony undermines Foster's version of events by creating an impossible timeline. To believe Foster, the jury would have to believe that moments after accepting Burks' invitation to his house, S.H.: (1) found Foster on a chat line; (2) agreed to have sex for money; (3) arranged to meet between S.H. and Burks' houses; and (4) actually met and had sex with Foster, all within approximately twelve minutes.

¶13 Based on the foregoing, we agree with the circuit court's conclusion that there was no prejudice shown from trial counsel's failure to call Burks. There is no reasonable probability of a different result even if he had been called.

¶14 Foster next argues that trial counsel was ineffective for failing to impeach S.H. about whether she actually saw a gun on the day she reported the assault. S.H. told police Foster had a gun, and she repeatedly referred to what Foster did with the gun. This varied from her trial testimony that she did not see a

gun, but merely believed he had one. The circuit court rejected this argument as well, noting that whether Foster actually had a gun was irrelevant—based on the way the offenses were charged, it sufficed if Foster caused S.H. to believe he had a gun. Thus, the lack of any impeachment on this point was not prejudicial. Foster counters that this misses the mark, because the impeachment was relevant to whether S.H. was being truthful about the encounter.

¶15 We agree, however, that there is no prejudice shown from the failure to impeach S.H. First, the sexual assault nurse examiner had testified that S.H. reported the assailant had a gun, so the inconsistency was already before the jury. Further, several questions were asked of S.H. at trial about whether she ever saw a gun and why, if she did not see one, she thought Foster had one. Additionally, use of S.H.'s prior inconsistent statements—the impeachment Foster thinks trial counsel should have pursued as a means of challenging S.H.'s credibility—would have opened the door to admit all her prior consistent statements to rebut any implication she was lying. *See* WIS. STAT. § 908.01(4)(a)2. (2013-14). The failure of trial counsel to further emphasize S.H.'s statements to police about a gun was not ineffective assistance.

¶16 Foster additionally claims cumulative error, based on the two prior claims of ineffectiveness plus alleged ineffectiveness for being unprepared, as shown by the low number of hours billed, calling witnesses by wrong names, failure to properly question the nurse examiner, failure to question S.H. about a $5 bill she allegedly threw into bushes before the assault, and not doing a better job of cross-examining S.H. during her rebuttal testimony. The circuit court adopted the State's analysis and concluded the errors were non-substantial and non-prejudicial.

¶17 We agree with the State's assessment of these arguments as "Monday-morning quarterbacking." *See* ***Weatherall v. State***, 73 Wis. 2d 22, 26, 242 N.W.2d 220 (1976). The issue in this case was simply one of consent, an issue that, at least here, was not particularly complicated. There is no suggestion that minor misnomers in a multi-day trial had any possible impact on the jurors. Further, the arguments about better examining witnesses are conclusory. In most cases, errors by counsel will not have sufficient cumulative impact to undermine confidence in the outcome of the trial. *See* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305. This case is no exception.[2]

¶18 Foster has not pled sufficient facts to show that he is entitled to postconviction relief. Therefore, whether to grant a hearing on the motion was left to the circuit court's discretion. We discern no erroneous exercise of that discretion in denying the motion without a hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

[2] For that reason, we also reject Foster's alternate argument that he should receive a new trial in the interests of justice.