COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1357-CR **Cir. Ct. No. 2012CF3450**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CEDRIC HAYES, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Cedric Hayes, Sr., appeals a judgment convicting him of one count of repeated sexual assault of a child. He also appeals orders denying his motions for postconviction relief and for reconsideration. He claims

his trial counsel was ineffective in multiple ways and that the circuit court erroneously denied him a hearing on his allegations. We disagree and affirm.

BACKGROUND

¶2 According to the criminal complaint, Q.L.W., a thirteen-year-old girl, ran away from home and stayed with Hayes, then thirty-seven years old, during the periods of April 20, 2012, through April 30, 2012, and June 3, 2012, through June 18, 2012. The State alleged that during each of those periods, Hayes engaged Q.L.W. in an act of sexual intercourse, and the State charged Hayes with two counts of second-degree sexual assault of a child in violation of WIS. STAT. § 948.02(2) (2011-12).[1] Hayes disputed the charges and demanded a jury trial.

¶3 Six days before trial began, the State filed an amended information alleging a single count of repeated sexual assault of the same child between April 20, 2012, and June 18, 2012. *See* WIS. STAT. § 948.025(1)(e). Hayes, by counsel, said he did not object.

¶4 The matter proceeded to trial in September 2013. We summarize the testimony most pertinent to the issues Hayes raises on appeal.

¶5 Q.L.W.'s mother, A.Q., described the time periods during which Q.L.W. was a runaway. Specifically, A.Q. said that Q.L.W. ran away from home in March 2012, returned for a brief visit, then ran away again. Police brought Q.L.W. home in June 2012.

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

¶6 When Q.L.W. took the stand, she also provided a partial timeline of events. She testified she could not recall the date she first ran away from home, but that it was some time in April 2012. She said she stayed with various people over a period of two-to-three weeks before someone brought her to Hayes's house. She thought she lived with Hayes for about a two-month period interrupted only by a visit with her mother on Mother's Day.[2] In early June, she returned to her mother's home, then ran away again and stayed with Hayes from approximately June 4, 2012, until June 18, 2012, when police found her at his house.

¶7 Q.L.W. testified that on the day she met Hayes, his house was cold and had no heat or electricity. Hayes suggested she get into bed with him to keep warm. She complied, and they had sexual intercourse twice during that night. Q.L.W. went on to testify that between the time she first arrived at Hayes's house and Mother's Day, Hayes had sex with her "every day. Sometimes twice a day." When she returned to him after Mother's Day, they had sexual intercourse approximately "every other day." She described an incident in June 2012 when she had sexual intercourse with Hayes three times, explaining that one of the acts terminated because Hayes's houseguest, Kayla Sienko, approached the bedroom.

¶8 Detective Tammy Tramel-McClain testified that she was a detective with the sensitive crimes division of the Milwaukee Police Department. She described her experience interviewing young victims of sexual assault and her observations about the characteristics of adolescent victims. She said she

[2] We take judicial notice, pursuant to 36 U.S.C. § 117(a) (2012), that Mother's Day fell on May 13, 2012. *See* WIS. STAT. § 902.01(2)(b) (2013-14) (we may take judicial notice of facts capable of ready and accurate determination by resort to sources whose accuracy cannot be disputed).

interviewed Q.L.W. on June 18, 2012, after Q.L.W. disclosed a sexual relationship with Hayes. Tramel-McClain went on to describe the tenor of the interview and her impressions that Q.L.W. was reluctant to talk and did not seem forthcoming.

¶9 Hayes elected to testify on his own behalf. He said he did not remember the precise date that he met Q.L.W., but it was "right after [he] moved in[to his] house." He recalled that he moved into the house in April 2012, and a few days later his utilities were temporarily disconnected. During direct examination, he testified about the utility problems:

> Q: Have there been power outages in your house?
>
> [HAYES]: Yes, the month I moved in and when I moved in I hesitated switch over to the utilities [sic], so probably 10 days to two weeks after I moved in, Wisconsin Electric turned it off[], and I had to go down there and put it in my name.
>
> Q: So that happened?
>
> [HAYES]: Yeah.
>
> Q: Okay. All right. So, Mr. Hayes, back in April of 2012, that's when you moved into the house?
>
> [HAYES]: Yeah.
>
> ....
>
> Q: Mr. Hayes, back to April of 2012. The young woman that testified earlier today, [Q.L.W.], when did you first meet that young lady?
>
> [HAYES]: It would be probably I would say like the end of April, like right after I moved in that house.
>
> Q: You don't remember the exact date, do you?
>
> [HAYES]: No, it was right about that time I had to switch the utility over.

¶10 Hayes went on to say that he gave Q.L.W. a place to stay. He acknowledged that the first night she slept at his house "was when the electricity was out so she was sleeping in the basement with no lights or electricity." He admitted that from that night forward, Q.L.W. was at his house "probably every day," although he claimed she slept there only three or four times. He categorically denied that he ever had sexual contact with Q.L.W. and suggested her accusations against him arose from her fantasies and desires.

¶11 In rebuttal, the State called Sienko. She testified that after she and Hayes ended their romantic relationship, she occasionally stayed at his house. She said this occurred during a time when Q.L.W. was sleeping in Hayes's bedroom. Sienko then described an incident in June 2012 when she "came up from the basement one day, and [Q.L.W.] was giving [Hayes] oral sex."

¶12 The jury found Hayes guilty as charged, and he moved for postconviction relief. His primary contention was that trial counsel was ineffective for failing to investigate the status of his utility service during the charging period. In support, he produced documentation from a utility company showing that he had heat and electricity in his house from April 1, 2012, until more than a year later. Therefore, he argued, if trial counsel had undertaken an investigation, trial counsel would have discovered that the utilities in his house were functioning throughout the charging period of April 20, 2012, through June 18, 2012. In Hayes's view, counsel's failure to investigate the status of his utility service was a prejudicial deficiency because the utility company documents prove "(1) the assaults never occurred and (2) if they did, they occurred outside the charging period."

¶13 Hayes raised four other claims of trial counsel's alleged ineffectiveness that are relevant here. Specifically, he claimed his trial counsel was ineffective for: (a) agreeing to the amended information; (b) not objecting to Tramel-McClain's testimony on the grounds that it was improper expert testimony and improper vouching for Q.L.W.; (c) not objecting to Sienko's rebuttal testimony; and (d) not investigating Q.L.W.'s "numerous lies" that, according to Hayes, he could have used at trial to impeach her credibility.[3]

¶14 The circuit court rejected Hayes's claims without a hearing and then denied Hayes's motion for reconsideration. Hayes appeals. Additional facts are discussed below as warranted.

DISCUSSION

¶15 Hayes alleges ineffective assistance of trial counsel. To prevail on such a claim, a defendant must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant fails to prove one component, a court need not consider the other. *See* ***id.*** at 697. To prove deficiency, Hayes must show that trial counsel's actions or omissions were "professionally unreasonable." *See* ***id.*** at 691. To prove prejudice, Hayes must show that trial counsel's errors had an actual, adverse effect on the defense. *See* ***id.*** at 693. Whether counsel's performance was deficient and whether the

[3] Hayes raised an additional claim of ineffective assistance of trial counsel in his postconviction motion, and he also sought relief on the ground of "plain error." Because he does not pursue those claims on appeal, we deem them abandoned and discuss them no further. *See* ***Cosio v. Medical College of Wisconsin, Inc.***, 139 Wis. 2d 241, 242-43, 407 N.W.2d 302 (Ct. App. 1987).

deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶16 A defendant claiming ineffective assistance of trial counsel must seek to preserve trial counsel's testimony in a postconviction hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nonetheless, a defendant is not automatically entitled to a hearing on the claim. A trial court must grant a hearing only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 13, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion contains sufficient allegations of material fact to earn a hearing presents an additional question of law for our independent review. *See* ***id.***, ¶9. To be sufficient, the motion should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***id.***, ¶23. If the defendant does not allege sufficient material facts that, if true, would entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.***, ¶9. We review a circuit court's discretionary decisions with deference. ***Id.***

¶17 Hayes first asserts his trial counsel was ineffective for failing to investigate the details of his utility service and for failing to determine that the heat and electricity were operating in his house throughout the charging period. In his view, trial counsel could have used the information to show that "the[] assaults never happened" or that they "occurred outside the ... charging period and were therefore irrelevant." He fails, however, to show that he ever told his trial counsel that his home had heat and electricity during the charging period. The United States Supreme Court long ago explained that "[c]ounsel's actions are usually

based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *See* ***Strickland***, 466 U.S. at 691. This principle applies here. Hayes faults trial counsel for not investigating the status of his utility service, but he does not demonstrate that he gave trial counsel a reason to think an investigation could aid the defense.

¶18 Hayes indicated in his postconviction motion that he did not realize the importance of determining the date of the power outage in his home because, he alleged, he did not receive "full discovery" until the trial was underway. Hayes failed, however, to reveal exactly what was in the allegedly belated discovery or the precise ways the content of that discovery differed from the materials he received before trial. These omissions are fatal to his claims. He had the burden to show that trial counsel was deficient; vague insinuations are insufficient. *See* ***Allen***, 274 Wis. 2d 568, ¶15 (categorically declaring that a postconviction motion requires more than conclusory allegations). Moreover, Hayes acknowledged in his postconviction submissions that his trial counsel told him "the dates counsel and the State believed the heat was out." The record therefore reflects that Hayes had the opportunity to consider the accuracy of the information about his utilities and to tell his trial counsel about any questions he had in this regard. He concedes that he never raised any such questions, and he incontrovertibly testified under oath that Q.L.W. slept in his house while the heat and electricity were not functioning.

¶19 Accordingly, the record lacks any support for the claim that trial counsel performed deficiently by forgoing an investigation into the status of Hayes's utility service. Indeed, when a defendant has given counsel reason to believe that pursuing a certain avenue of investigation would be fruitless,

counsel's failure to pursue that avenue may not later be challenged as unreasonable. *See* ***Strickland***, 466 U.S. at 691.

¶20 Although we need not reach the question, we also conclude that Hayes fails to show that he was prejudiced by trial counsel's allegedly deficient investigation. Hayes's postconviction submissions included not only documentation from a utility company showing he had uninterrupted utility service throughout the charging period but also his own allegations that "Mr. Hayes's service was *restored* on April 1, 2012," and that, notwithstanding the dates on which the State believed the power was out, "*in fact, those dates were prior to April 1, 2012*." (Emphasis added). He went on to assert: "any of Hayes' testimony as to when he moved into the residence and had contact with the alleged victim had to have been prior to April 1, 2012." If Hayes had produced this evidence at the time of trial, he would not have received any benefit. Rather, the State could have successfully moved under WIS. STAT. § 971.29 to amend the start of the charging period to include March 2012.

¶21 Pursuant to WIS. STAT. § 971.29(2), "[a]t the trial, the court may allow amendment of the ... information to conform to the proof where such amendment is not prejudicial to the defendant." A defendant is not prejudiced when the amendment to the charging document "'does not change the crime charged, and when the alleged offense is the same and results from the same transaction.'" ***State v. DeRango***, 229 Wis. 2d 1, 26, 599 N.W.2d 27 (Ct. App. 1999), *aff'd*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833 (citation omitted).

¶22 Hayes asserts a potential for prejudice here, but he fails to show where that prejudice lies. Nothing in his submissions demonstrates that amending the charging period to include March 2012 would have adversely affected his trial

strategy. His defense was uncomplicated: Q.L.W. was at his home "probably every day" after he first met her but he never had sex with her. Thus, an amendment would not have weakened an alibi or interfered with a claim of mistaken identity. Nor would an amendment have affected a statute of limitations defense. The State filed the criminal complaint in December 2012, well within the six-year statute of limitations for prosecuting a charge of repeated sexual assault of a child in violation of WIS. STAT. § 948.025(1)(e).[4]

¶23 Somewhat inconsistently, Hayes also appears to suggest he would have benefitted from an amended charging period because an amendment would have "weakened the State's position with the jury." The record does not support this optimistic conclusion. Indeed, amending the charging period to include March 2012 would have fit well within the State's trial evidence, which included testimony that Q.L.W. ran away in March 2012 and began living with Hayes two weeks later. Because Hayes and Q.L.W. agreed that the utilities in his house were not working when she met him, his proof that the power outage occurred before April 1, 2012, and was restored on that date would have corresponded with the timeline described by the State's witnesses and corroborated the victim's story.

¶24 In short, if Hayes had produced the evidence he offers now showing that his disconnected utility service was restored on April 1, 2012, he would not have reaped a benefit. Accordingly, he fails to show any prejudice flowing from his trial counsel's alleged deficiency in not producing that evidence.

[4] Effective March 29, 2014, the legislature extended the time limit for prosecuting the crime of repeated sexual assault of the same child in violation of WIS. STAT. § 948.025(1)(e), and established the deadline as the date on which the victim reaches forty-five years of age. *See* 2013 Wis. Act 167, § 2. The amendment does not apply here.

¶25 Hayes next claims his trial counsel was ineffective for not objecting when the State filed an amended information six days before trial. The claim must fail.

¶26 In the original information, the State alleged Hayes twice violated WIS. STAT. § 948.02(2) by sexually assaulting a child younger than sixteen years old. Each violation is a Class C felony, *see* ***id.***, carrying a maximum term of imprisonment of forty years and a maximum fine of $100,000, *see* WIS. STAT. § 939.50(3)(c). In the amended information, the State alleged Hayes committed one crime, namely, repeatedly sexually assaulting a child at least three times in a specified period in violation of WIS. STAT. § 948.025(1)(e). A violation of that statute is also a Class C felony carrying statutory maximum penalties of a forty-year sentence and a $100,000 fine. *See* §§ 948.025(1)(e), 939.50(3)(c).

¶27 As trial counsel explained on the record when the State proffered the amended information, "the amendment reduces Hayes's exposure, so strategically, we do not object." A reviewing court will not second-guess an attorney's trial strategy "'or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (internal citation omitted). In this case, the decision not to object to an amendment that halved Hayes's potential imprisonment if convicted is plainly a rational choice. Accordingly, Hayes shows no deficiency.

¶28 Additionally, we are satisfied that Hayes shows no prejudice. Hayes disagrees, claiming he suffered prejudice because the amendment "simplif[ied] the

case for [the] prosecution." Hayes misunderstands the assessment of prejudice in this context.

¶29 "The key factor in determining whether an amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations against him. There is no prejudice when the defendant has such notice." ***State v. Flakes***, 140 Wis. 2d 411, 419, 410 N.W.2d 614 (Ct. App. 1987) (internal citation omitted). In this case, the record shows that before permitting the amendment, the circuit court conducted an inquiry and defense counsel confirmed that "the discovery that's been turned over identifies multiple acts, more than three acts, which is required by the repeated sexual assault of child statute, and the defense is satisfied that [it has] notice of what those acts are." Accordingly, the record conclusively shows that Hayes was not prejudiced when counsel agreed to the amendment.

¶30 Hayes next claims that trial counsel was ineffective because Hayes "was not consulted" before trial counsel agreed to the amended information. The factual underpinnings for this alleged deficiency are not clear. Hayes was present in the courtroom when the circuit court stated that, following a discussion off the record, the parties had agreed to the amendment. Regardless, the alleged deficiency is inadequate to demonstrate ineffective assistance of counsel because Hayes again fails to show any prejudice. First, Hayes fails to allege that, if "consulted," he would have instructed his trial counsel to object to the amendment. *See* ***Allen***, 274 Wis. 2d 576, ¶¶15, 24 (claim of ineffective assistance of counsel requires more than conclusory assertions and must include a showing of how the alleged deficiency prejudiced the defendant). Second, Hayes fails to explain why, in light of ***Flakes***, the objection would have been successful. *See* ***State v.***

Jackson, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (burden is on defendant to show that a challenge counsel did not make would have succeeded).

¶31 Next, Hayes claims his trial counsel was ineffective for not objecting to the following exchange between the State and Tramel-McClain:

> Q: In your experience as an investigator having interviewed I think you said about a hundred adolescent or teen sexual assault victims in that 11 to 16 age range that we discussed a few minutes ago, based on that experience and perhaps drawing on your training, have you found that it's rare or common or just varies as to whether a teen-age child would be forthcoming about all the information involved in a sexual assault on the initial interview?
>
> [Tramel-McClain]: Most teen-agers are not forthcoming. If they were the same willing participants in the incidents, they aren't necessarily forthcoming. If it's something that's forced, then most of the [sic] them are forthcoming with the information.

¶32 According to Hayes, his trial counsel should have objected that the foregoing testimony was improper expert testimony that violated the requirements of ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), as codified at WIS. STAT. § 907.02 (2013-14). In postconviction proceedings, the circuit court rejected Hayes's claim, explaining that if his trial counsel had objected to Tramel-McClain's testimony, the circuit court would have overruled the objection and admitted the evidence in light of Tramel-McClain's experience and training.

¶33 Whether to admit expert testimony lies in the circuit court's discretion. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. Accordingly, to demonstrate prejudice here, Hayes must show that the circuit court would have erroneously exercised its discretion by admitting Tramel-

McClain's testimony over his objection. *See* ***Jackson***, 229 Wis. 2d at 344. Our standard of review requires that we search the record for reasons to sustain a circuit court's discretionary evidentiary ruling. *See* ***State v. Manuel***, 2005 WI 75, ¶24, 281 Wis. 2d 554, 697 N.W.2d 811. On this record, Hayes cannot demonstrate an erroneous exercise of circuit court discretion.

¶34 When considering the admissibility of expert testimony under ***Daubert***:

> the court's function "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." "The court is to focus on the principles and methodology the expert relies upon, not the conclusion generated," to ensure that those principles and methods have a reliable foundation in the expert's discipline."

State v. Smith, 2016 WI App 8, ¶5, 366 Wis. 2d 613, 874 N.W.2d 610 (citations omitted). According to Hayes, the testimony offered by Tramel-McClain describing her experiences as an observer of teenagers' behavior falls short of this reliability standard and thus should have been excluded as a mere "impressionistic generalization" that was insufficient to satisfy ***Daubert***.

¶35 We considered a similar claim in ***Smith***. There, a convicted defendant argued that the circuit court wrongly admitted a social worker's expert testimony about behaviors common among child abuse victims. *See* ***id.***, 366 Wis. 2d 613, ¶¶1, 3. We rejected the argument, explaining that the ***Daubert*** standard is flexible. *See* ***Smith***, 366 Wis. 2d 613, ¶7. Thus, the circuit court may appropriately consider a wide variety of factors relevant to the reliability of a proposed expert's testimony, including the expert's specific qualifications, training, specialized knowledge and years of experience in the field. ***Id.***, ¶¶8-9. In ***Smith***, the circuit court considered such factors, and we therefore upheld its

conclusion that the expert testimony satisfied the ***Daubert*** standard. *See* ***Smith***, 366 Wis. 2d 613, ¶9.

¶36 Here, the record made at trial established that Tramel-McClain had spent twelve years in law enforcement, had specialized training in interviewing young victims of sexual assault, had interviewed more than 100 adolescent victims, and had seven years of experience in the sensitive crimes division of the Milwaukee Police Department investigating sexual assault, child abuse, and similar offenses. The circuit court could reasonably exercise its discretion by finding that her training and experience qualified her to make an observation about adolescent sexual assault victims. Because the circuit court would have properly exercised its discretion by overruling a ***Daubert*** objection and admitting Tramel-McClain's testimony, Hayes suffered no prejudice when his trial counsel did not make such an objection. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (counsel not ineffective for refraining from making a futile motion).

¶37 Hayes relatedly claims his trial counsel was ineffective for failing to object that Tramel-McClain improperly vouched for Q.L.W. Citing ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), Hayes reminds us that one witness may not opine that another witness is telling the truth. *See* ***id.*** at 96. He asserts that the detective's testimony ran afoul of that rule when "[s]he testified that teenage sexual assault victims are typically not forthcoming at first." Hayes is wrong. The ***Haseltine*** court held that an expert went too far by testifying that "[the complainant] was an incest victim," *see* ***id.***, but the court went on to explain that an expert could testify more generally that failure to report an incestuous assault immediately is common among incest victims, *see* ***id.*** at 97. The testimony Hayes complains about here is precisely the kind that ***Haseltine***

allows. Because the detective's testimony was proper, trial counsel had no obligation to object. *See* ***Elm***, 201 Wis. 2d at 462.

¶38 Before we leave this issue, we note Hayes's contention that Tramel-McClain's testimony constituted "a discovery violation" because the State allegedly did not notify Hayes in advance of trial that the State would offer expert testimony. Hayes raises this claim for the first time on appeal. Accordingly, we do not address it. *See* ***DOT v. Scherffius***, 62 Wis. 2d 687, 696-97, 215 N.W.2d 547 (1974) ("[A]s a matter of judicial policy, we decline to consider legal arguments that are posed for the first time on appeal and which were not raised in the [circuit] court.").[5]

¶39 Hayes next claims his trial counsel was ineffective for failing to object to rebuttal testimony from Sienko. Hayes points out that the State said it intended to call Sienko as a witness in the State's case-in-chief. Because the State ultimately concluded its case-in-chief without calling Sienko, Hayes contends she should have been barred as a rebuttal witness. Hayes offers no citation in support of that proposition. Accordingly, we reject the claim. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments must be supported by legal citations).

[5] Our resolution of Hayes's allegation of a discovery violation leads us to observe that Hayes several times asserts in his reply brief that the State forfeited one or another of its arguments by not presenting them first in the circuit court. Hayes misunderstands the authority he cites in support of that proposition. Although judicial policy bars appellants from presenting arguments for the first time in the court of appeals, *see* ***DOT v. Scherffius***, 62 Wis. 2d 687, 696-97, 215 N.W.2d 547 (1974), "a respondent may advance for the first time on appeal any argument that will sustain the [circuit] court's ruling," *see* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998).

¶40 For the sake of completeness, we also note that Sienko's testimony—that she saw Hayes and Q.L.W. engaged in a sexual encounter—squarely rebutted Hayes's claim that he never had any sexual contact with Q.L.W. Wisconsin courts "have affirmed circuit courts' discretion to admit evidence in rebuttal even ... where the evidence could have been submitted in the State's case-in-chief." ***State v. Novy***, 2013 WI 23, ¶32, 346 Wis. 2d 289, 827 N.W.2d 610 (citations omitted). In postconviction proceedings here, the circuit court determined it would have exercised its discretion to permit the rebuttal testimony over any objection. The circuit court explained that Sienko was unavailable during the State's case-in-chief because she disregarded her subpoena and did not appear until she was arrested on a warrant. On those facts, said the court, it "would not have penalized the State for [] Sienko's non-compliance by barring her testimony." Because a motion to exclude Seinko's testimony would have been denied, Hayes cannot show he was prejudiced by trial counsel's failure to make such a motion. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

¶41 Finally, Hayes alleges his trial counsel was ineffective for failing to investigate Q.L.W.'s "numerous lies" and then failing to impeach Q.L.W. with evidence refuting them. As the State accurately points out, however, the only "lies" Hayes identifies are Q.L.W.'s statements to police that Amanda Ellis—a person who did not testify at trial—"had a tattoo of Hayes's name on her buttocks and was the mother of his child." Hayes does not show that his trial counsel performed deficiently by failing to pursue impeachment on these grounds.

¶42 First, as the circuit court pointed out when denying the postconviction motion, Hayes failed to support his claim with anything to show that the statements about Ellis were false or that Q.L.W. had reason to believe that they were false. *See* ***Allen***, 274 Wis. 2d 568, ¶15 (conclusory statement

insufficient to support postconviction motion). Second, Hayes failed to allege he told his trial counsel that the statements about Ellis were false. *See* ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390 (lawyer not ineffective for failing to investigate something defendant knew but did not disclose). Third, assuming for the sake of argument only that Hayes brought the alleged falsehoods to trial counsel's attention, WIS. STAT. § 906.08(2) forbids use of extrinsic evidence to impeach a witness's credibility on a collateral matter. *See* ***State v. Olson***, 179 Wis. 2d 715, 723-24, 508 N.W.2d 616 (Ct. App. 1993). "A matter is collateral if the fact to which error is predicated could not be shown in evidence for any purpose independently of the contradiction." ***Id.*** at 724. The allegations about Ellis are the epitome of collateral matters. Accordingly, Hayes does not show that his trial counsel performed deficiently in failing to investigate the allegations for impeachment purposes.

¶43 Because Hayes failed to allege sufficient material facts that, if true, would entitle him to relief, the circuit court had discretion to deny his postconviction motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. We review the circuit court's decision in this regard solely to determine whether the circuit court erroneously exercised its discretion. *See* ***State v. Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d 468, 673 N.W.2d 369. In light of our discussion, we are satisfied that the circuit court appropriately exercised its discretion by denying Hayes's postconviction motion without an evidentiary hearing. For the foregoing reasons, we affirm.

By the Court.—Judgment and orders affirmed.

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