COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP627 **Cir. Ct. No. 2007CF5865**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. LEE-KENDRICK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Robert D. Lee-Kendrick, *pro se*, appeals from an order of the circuit court that denied his postconviction motion without a hearing. Lee-Kendrick believes he is entitled to a hearing on the motion, and/or a new trial,

based on claims of ineffective assistance of trial counsel. We reject Lee-Kendrick's arguments and affirm the circuit court.

BACKGROUND

¶2 In December 2007, Lee-Kendrick was charged with multiple sexual assaults against three girls. *See* ***State v. Lee-Kendrick***, No. 2014AP1168-CR, unpublished slip op. ¶2 (WI App Apr. 14, 2015). He originally pled no contest to three felonies but was later allowed to withdraw the plea. *See* ***id.*** The case proceeded to a jury trial in June 2011. *See* ***id.***, ¶3. Lee-Kendrick was convicted of two counts of repeated sexual assault of the same child with respect to victims A.W. and T.K., and one count of second-degree sexual assault with respect to victim K.D.[1] *See* ***id.***, ¶¶3-4. Lee-Kendrick was sentenced to three consecutive terms of fifteen years' initial confinement and ten years' extended supervision each. *See* ***id.***, ¶5.

¶3 Lee-Kendrick filed two postconviction motions. The first motion sought a new trial based on ineffective assistance of trial counsel. Lee-Kendrick complained that trial counsel failed to object to certain questions asked of Lee-Kendrick on cross-examination. The motion claimed the questions implied a connection between him and Michael Lock, whom Lee-Kendrick describes in this appeal as a "crime boss" and who had prior convictions for homicide, drug dealing, kidnapping, and mortgage fraud. *See* ***id.***, ¶13. Lee-Kendrick also

[1] Lee-Kendrick was also acquitted on three counts of possession of child pornography and one count of child sexual exploitation in a separate criminal case that had been joined for trial. *See* ***State v. Lee-Kendrick***, No. 2014AP1168-CR, unpublished slip op. ¶3 n.2 (WI App Apr. 14, 2015.)

asserted that trial counsel was ineffective for failing to impeach two of the victims with prior inconsistent statements. *See* ***id.***, ¶19.

¶4 Lee-Kendrick's other postconviction motion sought resentencing, claiming the trial court had relied on inaccurate information regarding whether Lee-Kendrick was trying to hide from police during their investigation. *See* ***id.***, ¶26. The trial court denied both motions without a hearing. Lee-Kendrick appealed, and we affirmed. *See* ***id.***, ¶1.

¶5 In his current postconviction motion, brought under WIS. STAT. § 974.06 (2015-16),[2] Lee-Kendrick alleges multiple additional claims of ineffective assistance of trial counsel. To avoid a procedural bar, Lee-Kendrick also alleged postconviction counsel was ineffective for failing to raise these ineffective-assistance claims in her original motion.

¶6 The circuit court declined the State's invitation to simply apply the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), indicates that ineffective postconviction counsel may constitute a sufficient reason for avoiding the ***Escalona*** bar. Addressing Lee-Kendrick's arguments on their substance, the circuit court concluded that each issue lacked merit. It denied the motion, and Lee-Kendrick appeals.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

DISCUSSION

A. Standards of Review

¶7 Absent a sufficient reason, a defendant may not bring a claim in a WIS. STAT. § 974.06 motion if that claim could have been raised in a prior motion or direct appeal. *See* ***Escalona***, 185 Wis. 2d at 185; ***State v. Romero-Georgana***, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Certain claims, like claims of ineffective trial counsel must be preserved by a postconviction motion. *See* ***Rothering***, 205 Wis. 2d at 677-78. Thus, ineffective assistance from postconviction counsel may constitute a sufficient reason for not raising a claim in an earlier proceeding. *See* ***id.*** at 682.

¶8 To secure a hearing on his WIS. STAT. § 974.06 motion, Lee-Kendrick had to allege sufficient material facts—*i.e.*, who, what, where, when, why, and how—that, if true, would show he was entitled to relief on his claims. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶30; ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. When a motion contains insufficient allegations or is conclusory, or if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may deny the motion without a hearing. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶30. Whether the motion alleges sufficient facts is a question of law. ***Allen***, 274 Wis. 2d 568, ¶9.

¶9 For a court to conclude an attorney rendered ineffective assistance, the defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***id.***, ¶26. An attorney's conduct is deficient when it falls below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). Deficient performance is prejudicial if "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶10 When postconviction counsel is alleged to be ineffective for failing to raise certain issues in the trial court, the defendant must show that these nonfrivolous issues were clearly stronger than the issues postconviction counsel did raise. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46. This "clearly stronger" test is a way for reviewing courts to assess whether counsel performed deficiently, by comparing arguments now proposed against those previously raised. *See* ***id.***, ¶¶43-46.

B. Lee-Kendrick's Issues

¶11 As an initial matter, we note that Lee-Kendrick did not sufficiently allege that his unraised issues are clearly stronger than those raised by postconviction counsel. He did not claim, for example, that the unraised issues "are obvious and very strong," nor did he allege that postconviction counsel's failure to raise the issues cannot be explained or justified. *See* ***State v. Balliette***, 2011 WI 79, ¶69, 336 Wis. 2d 358, 805 N.W.2d 334. Further, while Lee-Kendrick correctly identified the "clearly stronger" test in his motion, he failed to apply it: his conclusory assertion at the close of his WIS. STAT. § 974.06 motion[3], that his issues or the "cumulative value" thereof means he has "clearly demonstrated" clearly stronger issues, is meaningless without comparison to the issues postconviction counsel did raise.

[3] Our review of the sufficiency of the pleadings is limited to the four corners of the motion, not additional argument in appellate briefs. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

¶12 Nevertheless, we, like the circuit court, conclude his claims also fail on the merits. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶¶11-12, 314 Wis. 2d 112, 758 N.W.2d 806 (describing "circular" and "cumbersome" analysis applicable when ineffective postconviction counsel is alleged as sufficient reason for avoiding procedural bar).

1. Joinder

¶13 Lee-Kendrick first claims that the repeated sexual assault charges involving A.W. and T.K. were improperly joined with the sexual assault charge involving K.D. because there is no overlapping evidence. Lee-Kendrick claims this made conviction on the offense involving K.D. "much more likely" than if it had been tried separately.

¶14 "Two or more crimes may be charged in the same complaint … if the crimes charged … are of the same or similar character[.]" WIS. STAT. § 971.12(1). "To be of the 'same or similar character' … crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Whether charges are properly joined in a complaint is a question of law. *See* ***id.*** "The joinder statute is to be broadly construed in favor of initial joinder." ***State v. Salinas***, 2016 WI 44, ¶31, 369 Wis. 2d 9, 879 N.W.2d 609.

¶15 While there were obviously some differences in each offense, the circuit court concluded that there was adequate overlapping evidence supporting initial joinder. All three victims were under age sixteen. Lee-Kendrick assaulted them in his River Hills home. He forced them to engage in penis-to-vagina intercourse. The circuit court found Lee-Kendrick "asserted his authority" as a

father figure or adult to isolate each girl from other people. Based on these facts, we are not persuaded that initial joinder was improper.[4]

2. Failure to Call a Certain Witness

¶16 Lee-Kendrick next complains that trial counsel was ineffective for failing to secure Kendrella Keeler as a witness. According to Lee-Kendrick, Keeler said that the day before reporting Lee-Kendrick's assault to police, A.W.—Keeler's best friend since elementary school—had blurted out that she was going to get Lee-Kendrick in trouble by any means necessary for coming between her and her mother. According to Lee-Kendrick, this prevented the real controversy from being fully tried because without Keeler's testimony, the jury could not properly evaluate Lee-Kendrick's credibility.

¶17 "Failure to call a potential witness may constitute deficient performance." ***State v. Jenkins***, 2014 WI 59, ¶41, 355 Wis. 2d 180, 848 N.W.2d 786. However, the defendant must still show prejudice. *See* ***id.***, ¶49. The circuit court concluded that failure to call Keeler was not prejudicial. She was not at the house at any of the times of the assaults, so she had no direct knowledge of the crimes charged. Further, Keeler had not thought much of A.W.'s comment about getting Lee-Kendrick in trouble—Keeler indicated that A.W. had been upset with Lee-Kendrick for other reasons on at least two prior occasions. Thus, even if a jury believed Keeler's testimony that A.W. had made such a statement, it would not, contrary to Lee-Kendrick's belief, necessarily have had to conclude that A.W.

[4] The circuit court additionally found that even if trial counsel should have moved to sever the offense involving victim K.D., such failure was harmless because evidence of the assaults on A.W. and T.K. would have been admissible in a separate trial. Lee-Kendrick does not directly challenge this ruling on appeal.

was expressing a motive for fabricating allegations against Lee-Kendrick. Finally, the circuit court noted that Keeler's testimony was inconsistent with the defense theory that A.W. and T.K. fabricated allegations in a dispute over Lee-Kendrick's confiscation of their material possessions. As a prejudice analysis is necessarily fact-driven, *see* ***id.***, ¶50, we are not persuaded that the circuit court improperly rejected this claim of ineffectiveness.

3. The Voicemail Message

¶18 Lee-Kendrick claims that trial counsel was ineffective for failing to use a voicemail message left by T.K. in which she supposedly apologized for making false allegations. We agree with the circuit court that the voicemail message itself would have been cumulative. T.K. had testified about calling to make the apology—because Lee-Kendrick had asked her to—and that she reported making the apology to the police. The omission of cumulative evidence is not prejudicial. *See* ***Brandt v. Matson***, 256 Wis. 314, 318, 41 N.W.2d 272 (1950).

4. Destruction of, and Failure to Move for Admission of, DNA Evidence

¶19 Lee-Kendrick claims that trial counsel should have moved to dismiss all charges "due to the investigating officers destroying apparently exculpatory DNA evidence." Specifically, he believes that because a search warrant authorized officers to collect "bedding" from his home, they acted improperly when they failed to collect all of the bedding from the home. Somewhat relatedly, Lee-Kendrick complains that trial counsel failed to move for the admission of DNA results that showed Lee-Kendrick was not the source of semen found on the single comforter that had been collected.

¶20 "A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory."[5] ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994); ***Arizona v. Youngblood***, 488 U.S. 51, 57-58 (1988). Lee-Kendrick's motion does not indicate how or why officers should have perceived any apparent exculpatory value in other bedding in his home, *see* ***Greenwold***, 189 Wis. 2d at 67, and a failure to collect merely potentially exculpatory evidence is not a violation of due process, *see* ***id.*** at 69.[6]

¶21 Lee-Kendrick notes that the DNA results from a comforter collected from one of the victim's rooms excluded him as the source. He complains that trial counsel should have moved for admission of that result. However, as the circuit court noted, introducing the results to show the DNA belonged to someone else would have been inadmissible under the Rape Shield law as evidence of a prior sexual assault.[7] *See* ***State v. Dodson***, 219 Wis. 2d 65, 71, 580 N.W.2d 181

[5] Lee-Kendrick's claim that the police "failed to preserve 'apparently potential' exculpatory DNA evidence" is thus an inaccurate combination of these two tests.

[6] It is entirely speculative that additional bedding had potential exculpatory value. Though Lee-Kendrick insists there is no speculation because he *knows* his DNA would not be found, he does not claim that there were actually any biological materials to be collected from the bedding for testing, and the absence of any specimens for testing is not exculpatory.

[7] Lee-Kendrick points to WIS. STAT. § 972.11(2)(b)2., which provides an exception to the Rape Shield protections for "[e]vidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered." Lee-Kendrick reads this exception to allow admission of the results to show the source of the semen. However, such evidence is only admissible for "the limited purpose of determining the extent of injury or degree of sexual assault[,]" neither of which is at issue in this case. *See* ***Michael R.B. v. State***, 175 Wis. 2d 713, 729, 499 N.W.2d 641 (1993). The jury was, however, informed that no incriminating evidence connected Lee-Kendrick to the bedding.

(1998). Trial counsel is not ineffective for failing to make a motion that would not have been granted.

5. Failure to Preserve Jury Communications

¶22 During deliberations, the jury requested a transcript of Lee-Kendrick's testimony. The trial court informed jurors that the transcript was not available, and they should narrow their request. The jury narrowed the scope of its request to three topics. Making a record later, the trial court memorialized only two of the specific topics, noting that the actual questions were not in front of it at that moment and it could not recall other specifics. Lee-Kendrick complains about this failure to fully preserve the communications from the jury.

¶23 We agree with the circuit court that any failure to preserve the jury's requests was harmless error. *See* ***State v. Anderson***, 2006 WI 77, ¶81, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by* ***State v. Alexander***, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126. The circuit court indicated that, although it could not recall the specifics of the requests, the jury was asking questions about Lee-Kendrick's testimony "that had no relevance to their deliberations or were discernable from the testimony." The circuit court additionally noted that the trial court's instruction to jurors, to rely on their collective memories, covered all of the requests and was agreed to by the parties. Lee-Kendrick has not shown prejudice from counsel's acquiesce.

6. Errors in the Transcript

¶24 Finally, Lee-Kendrick claims postconviction counsel was ineffective for failing to dispute the accuracy of transcripts certified by the court reporter. An appellant seeking record reconstruction must show that some reviewable error has

occurred relative to the missing record portion. *See* ***State v. DeLeon***, 127 Wis. 2d 74, 80-83, 377 N.W.2d 635 (Ct. App. 1985). This is required for two reasons: first, there is no reason to reconstruct useless or irrelevant portions of a record; and second, one key purpose of reconstructing a record is to protect a defendant's right to a fair trial and meaningful appellate review. *See* ***id.*** at 79-80. Meaningful appellate review is not hindered by the absence of evidence from which no error arises. Prejudice need not be shown, "but the error cannot be so trivial that it is clearly harmless." ***State v. Raflik***, 2001 WI 129, ¶40, 248 Wis. 2d 593, 636 N.W.2d 690.

¶25 Lee-Kendrick's postconviction motion does not identify with any specificity the errors he perceives in the transcripts, nor does he suggest what the "correct" transcript should say. Lee-Kendrick's self-serving and conclusory claim of error does not provide a basis for granting relief. To the extent that the errors relate to questions about Michael Lock, we previously determined that the mention of him that is in the record was harmless. *See* ***Lee-Kendrick***, No. 2014AP1168-CR, ¶¶14-16. Lee-Kendrick does not show that, even with whatever corrections he thinks are necessary, there would be a reviewable error.

7. Summary

¶26 None of Lee-Kendrick's issues raised in this appeal are particularly meritorious. As such, Lee-Kendrick has not demonstrated that these previously unraised claims are clearly stronger than those postconviction counsel originally raised. Thus, we cannot conclude postconviction counsel was deficient for failing to raise any of these issues in the first postconviction motion. Because postconviction counsel was not ineffective, there is no sufficient reason why these

issues could not have been raised earlier. The issues are, therefore, ultimately procedurally barred, and the circuit court did not err when it denied Lee-Kendrick's WIS. STAT. § 974.06 motion without a hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).