COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP975-CR **Cir. Ct. No. 2010CF5414**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESUS DAVID GUTIERREZ-MENDOZA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jesus David Gutierrez-Mendoza appeals a judgment convicting him of the following charges: one count of second-degree sexual assault of a child; one count of child enticement (exposing a sex organ); one count of repeated sexual assault of the same child (at least three violations of first- or second-degree sexual assault); and ten counts of sex with a child age sixteen or older. *See* WIS. STAT. §§ 948.02(2), 948.07(3), 948.025(1)(e), 948.09 (2009-10).[1] He also appeals the order denying his motion for postconviction relief. Gutierrez-Mendoza argues that his trial counsel gave him ineffective assistance and that he should be permitted to submit the victim's journal for postconviction forensic testing. We resolve these issues against Gutierrez-Mendoza. Accordingly, we affirm.

I. BACKGROUND

¶2 This case involves allegations that Gutierrez-Mendoza was sexually involved with C.J.P., a minor and family acquaintance.[2] Gutierrez-Mendoza denied the allegations and the case went to trial. There was no physical evidence corroborating any sexual contact between the two. Nor were there any witnesses to any inappropriate behavior. The trial amounted to a credibility battle between C.J.P. and Gutierrez-Mendoza. The jury convicted Gutierrez-Mendoza of all thirteen counts that were submitted.[3]

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

[2] C.J.P. was between the ages of fifteen and sixteen when the incidents occurred.

[3] One count was dismissed after C.J.P. testified that the incident occurred outside of Milwaukee County.

¶3 Gutierrez-Mendoza filed a postconviction motion seeking a new trial based on the ineffective assistance of his trial counsel and requesting forensic testing of C.J.P.'s journal page that listed dates she claimed she was with Gutierrez-Mendoza and dates when they had sex. The State relied on the journal page at trial. The trial court denied the motion without a hearing.

¶4 This appeal follows. Additional background information is provided in the discussion section.

II. DISCUSSION

A. *Ineffective Assistance of Trial Counsel*

¶5 Gutierrez-Mendoza alleges that his trial counsel was deficient in multiple respects. To succeed on a claim of ineffective assistance of counsel, Gutierrez-Mendoza must show both that his attorney performed deficiently and that said deficiency was prejudicial. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. Proving deficient performance requires showing facts from which we can conclude that the attorney's representation fell "below objective standards of reasonableness." *See* ***id.*** Proving prejudice requires showing "'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.'" *See* ***id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). We need not consider both prongs if the defendant fails to make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697.

¶6 A hearing on a postconviction motion is only required if "the movant states sufficient material facts that, if true, would entitle the defendant to relief."

State v. Allen, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges such facts is a question of law. *See* ***id.***, ¶9. If the motion alleges sufficient facts, the trial court is required to hold a hearing, but if the motion is insufficient or conclusory, or is unsupported by the record, the decision whether to grant a hearing is left to the trial court's discretion. *See* ***id.***

¶7 First, Gutierrez-Mendoza argues that his trial counsel should have impeached C.J.P.'s trial testimony with allegedly inconsistent or vague prior statements she made to police and during the preliminary hearing. Second, he argues that trial counsel should have exploited internal inconsistencies in C.J.P.'s trial testimony. Third, Gutierrez-Mendoza asserts that trial counsel failed to bolster his credibility in two respects: (1) by failing to highlight Gutierrez-Mendoza's offer to police to take a polygraph; and (2) by failing to object to testimony that Gutierrez-Mendoza had a prior arrest. Gutierrez-Mendoza concludes that these deficiencies created cumulative prejudice entitling him to a new trial. We will address each of his claims in turn.

(1) *Impeaching C.J.P. with inconsistent or vague prior statements.*

¶8 Unlike her initial statement to police and her preliminary hearing testimony, Gutierrez-Mendoza asserts that C.J.P.'s trial testimony was extremely detailed and specific. Moreover, he contends that her police statement, preliminary hearing testimony, and trial testimony all differed as to the number of alleged instances of intercourse. Gutierrez-Mendoza contends that C.J.P.'s "trial testimony was not only more specific than she ever had been before, it also contained critical new information and details she had never before provided, despite having been asked." Gutierrez-Mendoza points to C.J.P.'s reference to a "code," arguing:

> Trial was the first time that C.J.P. claimed that her journal contained a code that explained what happened between her and Gutierrez-Mendoza on the dates listed: "When there was a line, I just spent time with him. When there was 'XOX,' we had intercourse." This "code" testimony stands in contrast to her interview with [Officer Isabel] Monreal, in which C.J.P was asked to the explain the meaning of the list and she did not identify this code, and in contrast to her preliminary hearing testimony when she was asked directly about … how the list allowed her to remember specifics and she did not identify or mention the code[.]

(Record citation omitted.) C.J.P.'s utilization of this "code," Gutierrez-Mendoza argues, resulted in her testifying to nineteen instances of sexual intercourse, each one tied to a specific count in the amended information.

¶9 Gutierrez-Mendoza additionally criticizes trial counsel for not asking Officer Monreal about C.J.P.'s statements when the two first talked on October 22, 2010, to highlight inconsistencies with C.J.P.'s trial testimony. At the time of that initial interview, C.J.P. described the journal entry as the list of dates she and "Bebe," her name for Gutierrez-Mendoza, had sex. There is no indication in the report that C.J.P. said that on some of the dates listed, the two *did not* have sex. At that time, C.J.P. said, based on her journal, she had sex with Gutierrez-Mendoza twenty-one times.

¶10 Next, Gutierrez-Mendoza argues that when questioned during the preliminary hearing about how the journal page helped her identify which dates she had penis-to-vagina intercourse with Gutierrez-Mendoza, C.J.P. did not identify any coding or special notations. Instead, she simply said: "Because I could remember some of them." At that time, she testified she had penis-to-vagina intercourse with Gutierrez-Mendoza on eleven occasions rather than the nineteen instances she testified to at trial.

¶11 The State submits that C.J.P.'s statement to police and her preliminary hearing testimony were, in fact, consistent with her trial testimony. To the extent C.J.P.'s trial testimony was more detailed, the State argues that the reason for this, as it related to her statement to police, was C.J.P.'s initial reluctance to come forward.

¶12 We agree with the State's analysis as to the lack of detail in C.J.P.'s first statement to police:

> In other words, the fact that [C.J.P.] *did not* recount every single detail when she first disclosed the assaults to Officer Monreal does not mean[] that she *could not* remember the details of the assaults at the time of her police statement, nor does it render her trial testimony suspect, as Gutierrez[-Mendoza] argues. Rather, after being confronted with her journal, [C.J.P.] gave legitimate reasons as to why she was hesitant to accuse Gutierrez[-Mendoza] of the sexual assaults at first.
>
> For example, [C.J.P.]'s police statement shows that she began to recognize at the end of the relationship that Gutierrez[-Mendoza]'s behavior was wrong, but she still did not want to get him in trouble because she believed she still loved him. She also told Officer Monreal that she did not have any sexual contact with Gutierrez[-Mendoza] after the May 2010 intercourse, and decided to end the relationship so his family would not "suffer the consequences."
>
> [Trial testimony revealed that a]fter Officer Monreal began to confront [C.J.P.] with various questions, however, [C.J.P.] then began to "com[e] around" because she realized the extent of Gutierrez[-Mendoza]'s wrongdoing. [In her statement to Officer Monreal, s]he said that "everything happens for a reason," and when Officer Monreal pressed [C.J.P.] to explain what that meant, [C.J.P.] replied that she felt it had to stop. She never thought of disclosing the sex to anyone, [and] she thought about destroying the letters, and wished she would have.
>
> She further explained that she did not want the relationship to go any further, because she did not want him arrested, as he never forced her to have sex and she did not

> want to cause problems for his family. She thought she loved him, but was not sure anymore, and wanted to get on with her life. [C.J.P.] also wrote letters about how much she loved Gutierrez[-Mendoza], but was sad that he never made good on his promises to leave his wife.

(Record citations omitted.)

¶13 At trial, C.J.P. testified that she did not go to the police on her own to report the crimes; rather, her parents were the ones who involved the police after finding her journal. C.J.P. confirmed that when she first talked to the police, she did not want to tell them what had happened because she was scared, and she did not want anything to happen to Gutierrez-Mendoza. C.J.P. testified that, at that time, she was still in love with Gutierrez-Mendoza.

¶14 Beyond this, when she was cross-examined as to an inconsistency between her testimony at the preliminary hearing and her testimony at trial as to where one of the incidents occurred, C.J.P. explained her ability to recall the event: "All the memories come back. I still think of all this. Even though I'm not in court. I still think of it." Gutierrez-Mendoza's trial counsel nevertheless highlighted for the jury, during his cross-examination of C.J.P., that this new information as to the incident was being offered by C.J.P. for the first time on the day of trial. Gutierrez-Mendoza's trial counsel additionally questioned C.J.P. about the fact that she told her parents "it wasn't true," when they confronted her after finding her journal.

¶15 Even if we were to assume without deciding that Gutierrez-Mendoza's trial counsel performed deficiently for not doing more to highlight alleged inconsistencies, we conclude that Gutierrez-Mendoza has failed to establish prejudice. The effect of the inconsistencies—to the extent they can be categorized as such—was outweighed by C.J.P.'s otherwise clear testimony about

how Gutierrez-Mendoza sweet-talked her into believing he loved her and then abused that trust to commit the sexual assaults. We are not convinced that Gutierrez-Mendoza was prejudiced by trial counsel's failure to highlight what Gutierrez-Mendoza perceives were inconsistent or vague prior statements. *Cf.* ***State v. Smith***, 2002 WI App 118, ¶¶19-20, 23, 23 n.4, 254 Wis. 2d 654, 648 N.W.2d 15 (explaining that inconsistencies between trial testimony and previous statements do not by themselves render a witness wholly incredible).

(2) *Exploiting internal inconsistencies in C.J.P.'s trial testimony.*

¶16 According to Gutierrez-Mendoza, C.J.P.'s trial testimony was also internally inconsistent. She testified on direct examination that "[n]o one was ever home when we were together," but then said that the two had sex in Gutierrez-Mendoza's attic on a couple of occasions because other people were at his house, including his wife. Gutierrez-Mendoza additionally faults his trial counsel for not pursuing a line of questioning during his cross-examination of C.J.P. as to whether Gutierrez-Mendoza was circumcised.

¶17 Our review of the record reveals that Gutierrez-Mendoza's trial counsel did cross-examine C.J.P. about various internal inconsistencies in her trial testimony. Insofar as Gutierrez-Mendoza's trial counsel may have neglected to explore these particular lines of questioning, we again conclude that there was no prejudice to Gutierrez-Mendoza. "Showing prejudice means showing that counsel's alleged errors *actually* had some adverse effect on the defense." ***State v. Koller***, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838 (emphasis added). Gutierrez-Mendoza has not made such a showing.

(3) *Failing to bolster Gutierrez-Mendoza's credibility.*

¶18 Gutierrez-Mendoza goes on to criticize trial counsel for not eliciting testimony that Gutierrez-Mendoza denied ever having sexual contact or intercourse with C.J.P. and offered to take a polygraph test "to prove his innocence." Gutierrez-Mendoza's trial counsel was not deficient in this regard because Gutierrez-Mendoza's alleged offer to take a polygraph would have been inadmissible. Gutierrez-Mendoza has not proffered that he believed the polygraph test was "possible, accurate, and admissible." *See* ***State v. Santana-Lopez***, 2000 WI App 122, ¶¶4-5, 237 Wis. 2d 332, 613 N.W.2d 918 (holding that for an "offer" to take a polygraph to be relevant and admissible, the defendant must proffer that he believed the polygraph test was "possible, accurate, and admissible").

¶19 Gutierrez-Mendoza also argues that his trial counsel performed deficiently in failing to protect and to bolster Gutierrez-Mendoza's credibility. He faults trial counsel for not objecting to Officer Monreal's response when the prosecutor asked if she had taken any other steps to identify Gutierrez-Mendoza. Officer Monreal responded that she "ran" his name and "found out that he was arrested I believe one time and there was a photo of him."

¶20 The State concedes that a witness in a criminal case cannot be impeached by showing an arrest where there is no conviction. However, it argues that here, the failure to object amounted to harmless error. *See* ***State v. Gary M.B.***, 2003 WI App 72, ¶¶34-35, 261 Wis. 2d 811, 661 N.W.2d 435. We agree. It was said only once, without emphasis, and was not repeated during closing argument. *See* ***id.***, ¶35. Any objection by Gutierrez-Mendoza's trial counsel to the mention of a prior arrest would have only highlighted it for the jury.

¶21 Gutierrez-Mendoza heavily relies upon ***State v. Coleman***, 2015 WI App 38, 362 Wis. 2d 447, 865 N.W.2d 190, to support his argument that his trial counsel's alleged deficiencies prejudiced him. That case is distinguishable. There, we concluded that Coleman's trial counsel performed deficiently in a number of ways and that the cumulative effect of the deficiencies prejudiced Coleman. *See* ***id.***, ¶19. The deficiencies at issue in ***Coleman*** were more clear-cut than the alleged deficiencies here, and Coleman did not testify on his own behalf.

¶22 Instead, we conclude that the circumstances of this case are akin to those presented in ***State v. McDowell***, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500. McDowell, like Gutierrez-Mendoza, testified in his own defense. ***Id.***, ¶15. The Wisconsin Supreme Court "'readily acknowledge[d]'" that McDowell's testimony might have been "enhanced and clarified" through better questioning. ***Id.***, ¶62 (citation omitted). However, the ***McDowell*** court concluded that, based upon the consideration of all the evidence before the jury, the defendant suffered no prejudice because the "'defense was preposterous, and the State's evidence was overwhelming.'" ***Id.***, ¶¶63-64 (citation omitted).

¶23 In this case, C.J.P. provided clear testimony at trial that Gutierrez-Mendoza assaulted her on the many different occasions listed in her journal. She emphasized that she was not lying at trial and was telling the truth about all the incidents.

¶24 Meanwhile, Gutierrez-Mendoza steadfastly denied the assaults. The defense theory at trial was that C.J.P.'s version of events was fiction and that she was a girl who made up fairy tales. The jury did not buy Gutierrez-Mendoza's theory. The jury was aware that C.J.P. had lied before and heard impeaching testimony on cross-examination, but it still chose to believe her. The trial court

properly concluded that Gutierrez-Mendoza was not entitled to a ***Machner*** hearing.[4]

B. *Forensic Testing*

¶25 In his postconviction motion, Gutierrez-Mendoza additionally sought an order from the trial court allowing the original journal page to be submitted to a forensic document examiner for evaluation. Gutierrez-Mendoza argued that Forensic Document Examiner Jane A. Lewis would conduct nondestructive tests, including ink analysis, in an effort to ascertain whether some of the notations C.J.P. testified to were written at a different time than the date entry. C.J.P. answered affirmatively at trial when she was asked if she kept the list of dates listed on the journal page "as it went along." Gutierrez-Mendoza argued the reliability of the journal page and C.J.P.'s overall credibility and testimony about the "code" would be called into question if the testing revealed that the notations were written at a different time than the date entries.

¶26 A defendant may have postconviction discovery of physical evidence when the defendant shows that the evidence would be "relevant to an issue of consequence" and thus would create a reasonable probability of a different outcome at trial. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (Ct. App. 1999). Whether to grant postconviction discovery is committed to the trial court's discretion. *See* ***State v. Ziebart***, 2003 WI App 258, ¶32, 268 Wis. 2d 468, 673 N.W.2d 369.

[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶27 The possibility that an item of undisclosed information might have helped the defense is not enough. *See* ***O'Brien***, 223 Wis. 2d at 321. Consequently, Gutierrez-Mendoza is not entitled to postconviction discovery to assess or evaluate whether testing *might* have helped his case. *Cf.* ***State v. Kletzien***, 2008 WI App 182, ¶19, 314 Wis. 2d 750, 762 N.W.2d 788 (refusing a request for postconviction discovery after concluding that it was "nothing more than a fishing expedition … to explore the possibility that evidence may exist which may assist [the defendant]"). We conclude that the trial court properly denied Gutierrez-Mendoza's request.

By the Court.—Judgment and order affirmed.

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