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May 7, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1276-CR State v. Michael A. Roberts (L.C. #2015CF004432)

Before Kessler, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael A. Roberts appeals from a judgment of conviction for one count of third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2013-14).¹ Roberts also appeals from an

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

order denying his postconviction motion, which alleged that Roberts was entitled to a new trial because his trial counsel provided ineffective assistance concerning his cross-examination of a detective and the victim.² We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgment and the order.

BACKGROUND

Roberts was charged with one count of third-degree sexual assault for having non-consensual penis-to-vagina sexual intercourse with a seventeen-year-old female relative, “Jane,” as she slept in Roberts’s home.³ Roberts was also charged with one count of second-degree sexual assault for having sexual intercourse with a person who was under the influence of an intoxicant and therefore unable to give consent. The jury found Roberts guilty of the third-degree sexual assault but not guilty of the second-degree sexual assault.

At trial it was undisputed that on the night of the incident, Jane, Roberts, and Roberts’s wife were all intoxicated. Jane vomited and was put to bed by Jane’s brother and Roberts. Because Jane’s pants were soiled, her brother helped her remove them and put on a pair of Roberts’s boxer shorts, which Jane wore over her underwear.

According to Jane, she awoke to find Roberts on top of her and the boxer shorts removed. Jane testified that Roberts had penis-to-vagina sexual intercourse with her even though she told

² The Honorable Ellen R. Brostrom presided over the jury trial and sentenced Roberts. The Honorable Jeffrey A. Wagner denied the postconviction motion.

³ We have chosen to identify the victim using the pseudonym Jane in order to protect her identity. Each time we quote from the transcript or the briefs, we have substituted “Jane” for the victim’s name or initials.

him “to stop.” Shortly thereafter, she telephoned her mother, who came to the home. The police were contacted. Jane was taken to the hospital for a sexual assault examination that included the collection of swabs of her vaginal area and thighs. Roberts’s penis was also swabbed to collect DNA.

At trial, a DNA analyst testified that although none of the swabs collected from Jane and Roberts contained semen, the analyst was able to determine that the mixture of DNA recovered from the head and shaft of Roberts’s penis was 26 trillion times more likely to have come from Roberts and Jane than from Roberts and anyone else. The analyst also testified that the male DNA recovered from swabs of Jane’s inner thigh and vaginal area was consistent with Robert’s DNA.

Roberts took the stand in his own defense and denied any sexual contact or intercourse with Jane. He testified that he passed out and was later awoken by police officers who arrested him and took him to the hospital so his DNA could be collected.

After Roberts was found guilty of third-degree sexual assault, he was sentenced to three years of initial confinement and five years of extended supervision. Roberts filed a postconviction motion seeking a new trial on grounds that trial counsel provided ineffective assistance. The motion noted that at trial, the trial court ruled that trial counsel could not cross-examine Detective Geri Lin Dunn about statements Jane made to her shortly after the incident because when Jane was on the witness stand, trial counsel failed to ask her about her statements to Dunn. The postconviction motion alleged that the trial court’s ruling—which Roberts does not challenge—prevented trial counsel from eliciting important testimony from Dunn concerning

six inconsistencies between Jane's statement to Dunn and Jane's trial testimony. The postconviction motion stated:

Jane's credibility is the central issue in this case. There are numerous differences in her testimony and her statement to Detective Dunn. First, she testified that Roberts had his hand over her mouth during the incident. She never told Detective Dunn that Roberts had his hand over her mouth. Second, she told Detective Dunn that the first time she remembered seeing Roberts after going to sleep was when he was standing in the doorway. She testified that the first time she remembered seeing him after she was going to sleep was when he was on top of her. Third, she told Detective Dunn that Roberts fondled her vagina before having intercourse with her. She did not testify to any fondling. Fourth, she told Detective Dunn that Roberts pulled her underwear off before hav[ing] intercourse with her. She testified that Roberts slid her underwear to the side while having intercourse with her. Fifth, she told Detective Dunn that Roberts pulled her right leg up with his left hand and had intercourse with her. She did not testify to anything about this. Sixth, she told Detective Dunn that the intercourse lasted seven minutes. She testified that it lasted three to five minutes.

The trial court denied the motion in a written order without a hearing. It accepted Roberts's assertion that trial counsel performed deficiently, but it concluded that Roberts was not entitled to relief because Roberts had not demonstrated prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense.). The trial court explained:

Despite some inconsistencies in her testimony, the victim testified *consistently* that [the] defendant had penis-to-vagina intercourse without her consent. Her testimony was corroborated by evidence that her DNA was found on the head and shaft of the defendant's penis and that his DNA was found on her intimate parts. The DNA evidence was particularly damaging to the defendant's credibility because, in spite of it, he denied having any sexual contact with the victim, and his attempt to dispel the State's DNA evidence was totally unconvincing.

In contrast, the discrepancies in the victim's testimony were relatively minor, and given the consistencies in her testimony about the sexual assault itself, there is no reasonable probability that the jury would have disbelieved that a sexual assault occurred or that it was nonconsensual if they had been fully presented.

(Footnote omitted.) This appeal follows.

LEGAL STANDARDS

As noted, to succeed on a claim of ineffective assistance, a defendant must demonstrate both deficiency and prejudice. *See id.* Demonstrating prejudice requires a defendant to “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. A court need not consider both the deficiency prong and the prejudice prong if the defendant fails to make a sufficient showing on either one. *See id.* at 697.

“A hearing on a postconviction motion is only required when 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 does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.” *Id.* We apply “the deferential erroneous exercise of discretion standard” to the trial court’s decision whether to hold a hearing. *Id.*

DISCUSSION

Even if we assume that trial counsel performed deficiently, we agree with the trial court that Roberts is not entitled to relief because he has not demonstrated prejudice. Most significantly, he has not successfully refuted the DNA evidence presented at trial. Roberts's appellate brief explicitly acknowledges that the DNA evidence hurt his defense, but he does not attempt to refute that evidence, instead asserting only that "the unfavorable DNA evidence makes Jane's prior inconsistent statements more important to Roberts'[s] defense." This is not a persuasive argument. Given the facts in this case, unless Roberts can offer a plausible explanation for the DNA evidence, he cannot successfully "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *Strickland*, 466 U.S. at 694.

The postconviction motion briefly noted that during trial counsel's cross-examination of the DNA analyst, trial counsel suggested that DNA consistent with Roberts might have been found on the victim because the DNA transferred from his boxer shorts to the victim when she wore them.⁴ The motion did not explain that in response, the DNA analyst testified that "there would have to be an outrageously extenuating situation for that to occur" because "there usually has to be some kind of a wet contact, extended contact for the DNA to transfer." She explained:

⁴ Trial counsel did not present that theory in his closing argument. Instead, he offered other theories in his closing argument that attempted to discredit the DNA evidence. For instance, he argued that the female DNA on Roberts's penis could have belonged to Roberts's wife or that the male DNA found on the victim could have come from another man. Roberts's postconviction motion and appellate brief do not repeat those theories or offer any support for them.

DNA isn't mobile. It has to be ... moved. It doesn't burrow. It doesn't swim. It doesn't jump.

It has to be in large quantities, and it has to be moved. So it usually has to be in a wet form, you know, even a large dried stain would be more difficult. So in order for it to go from an outer garment through an inner garment and then ... into a vaginal cavity would be very difficult.

Roberts's postconviction motion and appellate brief do not offer any evidence to support the theory that DNA consistent with Roberts was transferred to the victim from his boxer shorts, and neither document offers another plausible explanation for DNA consistent with Roberts being found in Jane's vaginal area and thighs. In addition, Roberts's postconviction motion and appellate brief do not provide a plausible explanation for Jane's DNA being found on Roberts's penis.

Further, we agree with the trial court that the inconsistencies Roberts identified in his postconviction motion were relatively minor and do not outweigh Jane's consistent testimony that Roberts had sexual intercourse with her. We are not persuaded that a jury hearing about the inconsistencies between Jane's statement to Detective Dunn and Jane's testimony would have found that the sexual assault did not occur, especially in light of the aforementioned DNA evidence, the fact that Jane immediately reported the assault, and the testimony of others who observed Jane in the hours following the assault.

In summary, we agree with the trial court that Roberts has not demonstrated that he was prejudiced by trial counsel's failure to ensure that he could ask Detective Dunn about inconsistencies in Jane's statement and testimony. The record conclusively demonstrates that Roberts was not entitled to relief. Therefore, he was not entitled to a hearing on his motion, and we discern no erroneous exercise of discretion in the trial court's decision not to hold such a

hearing. *See Allen*, 274 Wis. 2d 568, ¶9. We summarily affirm the judgment and the order denying Roberts's postconviction motion.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals