COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP190-CR **Cir. Ct. No. 2009CF1245**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES HOWARD,

DEFENDANT-APPELLANT.

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

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

¶1 BRENNAN, J. James Howard appeals from an amended judgment of conviction, entered after a jury found him guilty of one count of second-degree sexual assault of an inmate by a correctional officer and one count of third-degree sexual assault, and from an order denying his amended postconviction motion for

relief. In short, Howard complains that his trial counsel was constitutionally ineffective. We disagree and affirm.

BACKGROUND

¶2 On March 11, 2009, the State filed a criminal complaint, alleging that Howard sexually assaulted two inmates at the Milwaukee County Criminal Justice Facility, S.T. and M.R., while Howard worked there as a correctional officer. With respect to each victim, the complaint charged Howard with one count of second-degree sexual assault of an inmate by a correctional officer and one count of third-degree sexual assault, for a total of four counts.

¶3 On March 19, 2009, Howard, who was represented by trial counsel, waived his right to a preliminary hearing. His trial counsel did not file any pretrial motions to suppress evidence. A jury trial was held September 14-17, 2010, and Howard was found guilty of the two charges involving M.R., and not guilty of the two charges involving S.T.

¶4 After trial but prior to sentencing, Howard's trial counsel filed a belated motion to suppress buccal swab evidence collected from Howard, including the DNA evidence obtained from the buccal swab. In that motion, trial counsel asserted that on March 7, 2009, the Milwaukee Sheriff's Department obtained a search warrant authorizing penile and buccal swabs be taken from Howard's person.[1] Howard was taken by law enforcement to the Sexual Assault Treatment Center where medical staff obtained the penile and buccal swabs. The

[1] As we will see later on, both Howard's trial counsel and the State were mistaken in their initial belief that the search warrant permitting seizure of the penile swab also permitted seizure of the buccal swab.

motion sought suppression solely on the ground that no return of the search warrant was filed with the clerk within forty-eight hours of execution of the search as required by statute. *See* WIS. STAT. § 968.17(1) (2011-12).[2]

¶5 In its response to the motion, the State agreed that the buccal swab had been obtained pursuant to a search warrant and admitted that it had been unable to find any record that the Sheriff's Department had filed a return of the warrant. The State acknowledged that the buccal swab was the source of Howard's DNA profile, and DNA evidence relating thereto was presented at trial. The State, however, argued that the post-verdict motion was procedurally barred, and that controlling caselaw holds that failure to return a search warrant in violation of statute does not necessitate suppression of the evidence. The trial court agreed and denied the motion on those grounds. Howard does not challenge that ruling on appeal.

¶6 Howard was sentenced on May 17, 2011. Following sentencing, Howard's trial counsel filed a WIS. STAT. § 809.30 motion for postconviction relief, alleging that a juror had been seen sleeping and challenging Howard's sentence as unduly harsh. Thereafter, before the trial court ruled on Howard's postconviction motion, Howard's trial counsel was permitted to withdraw her representation of Howard, at Howard's request, and present postconviction counsel was substituted as counsel for Howard.

¶7 Through his new counsel, Howard submitted an amended postconviction motion for a new trial, alleging ineffective assistance of his

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

recently-withdrawn trial counsel. In the motion, Howard alleged that his trial counsel was ineffective for: (1) failing to file a motion to suppress the DNA evidence obtained from the buccal swab because the evidence was obtained without a warrant; (2) failing to file a motion to suppress the search warrant authorizing seizure of Howard's penile swab because the State had not produced the affidavit in support of the search warrant; and (3) failing to object to a statement made during the trial by a sexual assault nurse who examined M.R. on the ground that the nurse improperly gave her opinion regarding M.R.'s truthfulness in violation of ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

¶8 The trial court, without an evidentiary hearing, denied Howard's claims of ineffective-assistance based on trial counsel's alleged failure to file a motion to suppress the buccal swab evidence and alleged failure to object to the nurse's testimony on ***Haseltine*** grounds. But the trial court withheld judgment on Howard's claim that trial counsel was ineffective for failing to file a motion to suppress the penile swab evidence and held an evidentiary hearing on that claim.

¶9 At the evidentiary hearing, two Milwaukee police detectives, who sought search warrants during the investigation, and Judge Thomas Donegan, who signed the search warrant for the penile swab, testified. After the hearing, the trial court denied Howard's claim that his trial counsel had performed ineffectively for failing to challenge the penile swab evidence on the ground that the State had failed to produce the supporting affidavit.

¶10 Howard appeals. Additional facts are included in the remainder of the decision as necessary.

DISCUSSION

¶11 On appeal, Howard argues that his trial counsel's performance was constitutionally ineffective. The right to the effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable here by the Fourteenth Amendment, and article 1, section 7 of the Wisconsin Constitution. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 225-26, 548 N.W.2d 69 (1996). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. *See* ***id.*** at 697.

¶12 To prove deficient performance, the defendant must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must 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.

¶13 Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** Its legal conclusions as to whether the

lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo*. ***Id.*** at 128.

¶14 A defendant is entitled to an evidentiary hearing on a motion for postconviction relief alleging ineffective assistance of counsel only if the defendant alleges facts that, if true, would entitle him to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review." ***Id.*** We first look to "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo." ***Id.*** If the motion raises sufficient facts, the trial court must hold a hearing. ***Id.*** "[I]f 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 review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard." ***Id.***

¶15 Howard challenges his trial counsel's performance on three grounds: (1) because trial counsel failed to file a motion to suppress the buccal swab evidence collected from Howard on grounds that the evidence was obtained without a warrant; (2) because trial counsel failed to file a motion to suppress the penile swab evidence on grounds that the State never produced the signed supporting affidavit; and (3) because trial counsel failed to object to the testimony of the sexual assault nurse on ***Haseltine*** grounds. He further challenges the trial court's decision to deny two of his ineffective-assistance claims without an evidentiary hearing. We address each of Howard's complaints in turn.

I. Buccal Swab Evidence.

¶16 Howard first argues that the trial court erroneously exercised its discretion when it denied him an evidentiary hearing on his claim that his trial counsel performed ineffectively when she failed to file a pretrial motion to suppress the buccal swab evidence because, as we now know, that evidence was not obtained pursuant to a warrant. However, the record conclusively shows that trial counsel's performance was neither deficient nor prejudicial, and therefore, we must affirm. *See* ***Strickland***, 466 U.S. at 687; *see also* ***Allen***, 274 Wis. 2d 568, ¶9 (A defendant is not entitled to an evidentiary hearing if his or her motion does not raise facts sufficient to entitle the movant to relief.).

¶17 In his amended postconviction motion, Howard asserted that trial counsel was ineffective because she failed to file a pretrial motion to suppress Howard's buccal swab evidence. The motion correctly asserted that both trial counsel and the State failed to recognize, both prior to trial and post-trial when litigating Howard's motion to suppress the buccal swab evidence for failure to file a return, that the search warrant authorizing police to collect Howard's penile swab did not also authorize collection of the buccal swab. Howard asserted that because the search warrant did not include the buccal swab, a pretrial motion to suppress Howard's buccal swab evidence would have been successful. He asserted that therefore trial counsel's failure to file a pretrial motion to suppress on the ground that the search warrant did not permit seizure of the buccal swab constituted deficient performance and was prejudicial because the resulting DNA evidence was important at trial.

¶18 In its response to the amended postconviction motion, the State candidly admitted that the search warrant for collection of Howard's penile swab

did not also permit collection of the buccal swab, that the State had previously failed to recognize that oversight, and that the State had mistakenly asserted that the buccal swab was taken pursuant to a search warrant. The State argued, however, that the fact that the buccal swab was not collected pursuant to a search warrant did not automatically entitle Howard to relief on his claim that trial counsel was ineffective for failing to file a motion to suppress the buccal swab because:

> Had the [trial] court suppressed the buccal swabs collected on March 7, 2009, the State could have obtained the defendant's buccal swabs, and in turn his DNA, by filing with the trial court a motion asking the court to order the defendant to provide buccal swabs or the State could have obtained a search warrant authorizing the collection of buccal swabs from the defendant. Since the defendant's DNA would not have changed, it is immaterial when buccal swabs were collected from him.

The trial court agreed with the State and denied Howard relief without an evidentiary hearing.

¶19 The parties raise these same arguments on appeal, and Howard additionally claims that the trial court erroneously exercised its discretion in denying him an evidentiary hearing on his claim.

¶20 This case is akin to ***State v. Ward***, 2011 WI App 151, 337 Wis. 2d 655, 807 N.W.2d 23. In ***Ward***, the defendant complained "that his trial lawyer was constitutionally ineffective because he did not seek suppression of the DNA sample taken from him as a result of the court commissioner's order" even though "the court commissioner issued the order without first requiring [the] supporting evidence be under oath." ***Id.***, ¶7. We concluded that the defendant failed to show that any failure by trial counsel to move to suppress the DNA evidence was either deficient or prejudicial "because even assuming that [the defendant's] trial lawyer

should have sought suppression of [the] compelled DNA sample, the State could have easily cured the matter by submitting [a proper] affidavit." ***Id.***, ¶11.

¶21 Similarly, here, a conclusion that police did not have a valid warrant to seize the buccal swab "does not end our analysis" because "the State could have easily cured the matter" by requesting a court order or search warrant for the buccal swab at any time before trial. *See* ***id.*** Nowhere in his submissions to this court does Howard argue that the police did not have probable cause to obtain a court order or a search warrant for a buccal swab; his sole argument on appeal is simply that the police did not obtain a search warrant. Moreover, the record clearly shows that the police had ample evidence to establish probable cause.

¶22 On March 7, 2009, the day of the alleged assaults, police obtained a search warrant "to seize [Howard's] underwear and to obtain external penile swabs" based on an affidavit submitted by Milwaukee Police Detective Fernando Santiago. In the affidavit, Detective Santiago summarized interviews police had with both alleged victims, during which each gave police a detailed account of Howard entering their individual cells, threatening them with disciplinary action, and then forcing them to engage in multiple sex acts against their will. The affidavit further detailed the examinations each woman had undergone at the Sexual Assault Treatment Center and the evidence collected from the women during those examinations, including vaginal, cervical, and buccal swabs. Howard does not argue that that evidence was insufficient for police to obtain a search warrant for Howard's underwear and penile swab on March 7, and, as such, it certainly would have been sufficient for police to obtain a search warrant for a buccal swab prior to trial. Like the defendant in ***Ward***, Howard has failed to show "prejudice under ***Strickland*** or that his trial lawyer was constitutionally deficient

because a lawyer need not do things that accomplish nothing." *See* ***Ward***, 337 Wis. 2d 655, ¶11.

¶23 Howard alleges that ***Ward*** is inapplicable in this case because he claims that here, unlike in ***Ward***, both the detectives and the prosecutors actively engaged in misconduct and purposefully misstated that the search warrant issued for Howard's penile swab also permitted police to collect the buccal swab. He further contends that the trial court's finding that the State did not intentionally manipulate the system is clearly erroneous. We disagree.

¶24 The trial court's conclusion—that the State did not purposefully collect the buccal swab without a search warrant and then knowingly misinform the court and Howard that the buccal swab was obtained pursuant to the warrant—is firmly rooted in the record. *See* ***State v. Ayala***, 2011 WI App 6, ¶10, 331 Wis. 2d 171, 793 N.W.2d 511 ("The [postconviction] court's findings of evidentiary or historical fact will not be overturned unless they are clearly erroneous."). We agree with the State that:

> [t]here is absolutely nothing in the record to suggest that this was anything but an honest mistake. The same facts that established probable cause for the search warrant for the penile swabs also would have provided probable cause for collection of Howard's buccal swabs. There is no reason that the detectives who sought the penile swabs search warrant would have intentionally, for some nefarious purpose, have failed to request authorization for collection of the buccal swabs. … [T]he detectives who obtained the search warrant for the penile swabs simply inadvertently failed to also include a request for authorization for the buccal swabs.

There is no basis in the record for Howard's conclusory assertions that the detectives and the prosecutors knowingly engaged in misconduct.

¶25 Because ***Ward*** is applicable here, and because the record conclusively demonstrates that Howard's trial counsel was not constitutionally ineffective for failing to file a motion to suppress the buccal swab evidence, *see* ***Strickland***, 466 U.S. at 687, we conclude that the trial court did not erroneously exercise its discretion when it denied Howard an evidentiary hearing on this claim, *see* ***Allen***, 274 Wis. 2d 568, ¶9.

II. Penile Swab Evidence.

¶26 After the jury found Howard guilty of sexually assaulting M.R., trial counsel filed a motion to suppress the penile swab evidence on the grounds that a return of the warrant had never been filed. The trial court denied the motion and Howard does not appeal from that decision. Rather, Howard now argues that his trial counsel was ineffective for failing to file a pretrial motion to suppress the penile swab evidence on grounds that: (1) the warrant allegedly bears an unauthorized signature; and (2) the State failed to produce the affidavit in support of the warrant and therefore cannot show that the warrant was based on probable cause. Howard further argues that the trial court erroneously exercised its discretion during the evidentiary hearing on Howard's penile swab claim when it admitted into evidence testimony of the "usual practices" of Judge Donegan, who signed the warrant. We disagree.

¶27 In his amended postconviction motion, Howard argued that his trial counsel's performance was constitutionally ineffective because she failed to file a pretrial motion to suppress the search warrant authorizing seizure of Howard's penile swab on the ground that the signed, sworn affidavit in support of the search warrant had been lost. In its response, the State admitted that while it had produced a signed copy of the search warrant, which stated it was issued based

upon probable cause as set forth in the affidavit of Detective Santiago, the State had been unable to locate a signed copy of the affidavit. The State was able to produce an unsigned copy of the affidavit that it claimed Judge Donegan reviewed before issuing the search warrant. The trial court held an evidentiary hearing on that claim.

¶28 At the evidentiary hearing, the State presented testimony from two police detectives who sought search warrants from Judge Donegan related to the Howard investigation, and from Judge Donegan.

¶29 Detective Santiago testified that, in March 2009, he was a detective in the Milwaukee County Sheriff's Department and that he personally typed the affidavit in support of the search warrant for Howard's penile swab. Detective Santiago testified that the affidavit was reviewed by his captain, and that he and Milwaukee Police Detective Todd Rosenstein, who had typed up a separate affidavit for a search of Howard's residence, went together to the jail records section of the Milwaukee County Criminal Justice Facility, where a notary swore Detective Santiago to the information in the affidavit, and Detective Santiago signed the affidavit. Detective Santiago identified an unsigned and unsworn copy of the same affidavit he had written, sworn to and signed, and that affidavit was admitted into evidence.

¶30 Detective Santiago testified that he was positive that he was sworn to the affidavit by the notary public and signed it before the notary public, that he then took that signed and sworn affidavit to Judge Donegan's residence, and that Judge Donegan reviewed it and issued a search warrant based upon it.

¶31 Detective Rosenstein testified that he played a lead role in the Howard sexual assault investigation and that he and Detective Santiago were in

the same room when Detective Santiago drafted the affidavit for the penile swab search warrant and Detective Rosenstein drafted an affidavit for a search of Howard's residence. Detective Rosenstein testified that an assistant district attorney reviewed both of the detectives' affidavits before they were sworn to and signed. Detective Rosenstein remembered being present when Detective Santiago signed his affidavit in front of a notary public. He and Detective Santiago then went together to Judge Donegan and presented their respective affidavits and search warrants to him. Detective Rosenstein testified that he observed Judge Donegan review Detective Santiago's affidavit prior to signing the search warrant. Prior to the hearing, Detective Rosenstein had searched for Detective Santiago's sworn and signed affidavit, but could not locate it, although he did locate an unsigned copy of it and he located the signed search warrant.

¶32 Judge Donegan, the circuit court judge who signed the search warrant permitting seizure of the penile swab, also testified and identified his signature on the search warrant. While he had no memory of the detectives actually applying for the search warrant, he testified regarding his usual practice when police come to him for a warrant. He testified that "we certainly look to see that it's a signed affidavit and then we look for the contents of the affidavit to determine whether we believe there is probable cause to authorize the activity asked for without any prior action." He testified that he "would not sign anything that did not have the signature in the affidavit. We look for a signed affidavit. That's a basic."

¶33 The trial court found the testimony of all three witnesses credible and then set forth the following:

> The Court makes the following findings of fact having been convinced of them beyond a reasonable doubt. Then

Detective Fernando Santiago employed by the Milwaukee County Sheriff's Department on March 7, 2009 prepared a written affidavit on his computer for the purpose of obtaining penile swabs from the defendant, a then suspect in two sexual assaults in the jail where he was a correctional officer. The affidavit was typed in the Criminal Investigation Division offices. The very same office in which Detective Todd Rosenstein, the lead detective on this matter, prepared his affidavit. They were prepared at roughly the same time on separate computers. They were reviewed by A.D.A. Erin Karshen as well as someone in the department itself, that is, the Sheriff's Department, and then both detectives together went to jail records, an area in the Criminal Justice Building, to sign the affidavits after being sworn by a notary. The signature being done in the presence of a notary. Both affidavits were signed in the presence of a notary employed by the Sheriff's Department who was staffing jail records at that time of the late evening, early night hours. Exhibit 2 contains the language and format that constitutes the affidavit prepared by Detective -- then Detective Santiago. The search warrants were signed, one -- strike that -- the affidavits prepared by then Detective Santiago and Detective Rosenstein were signed one after the other in front of the same notary public after each detective was respectively sworn.

The detectives then took the search warrants together to the residence of Judge Donegan. Judge Donegan was the designated duty judge for that particular night. Judge Donegan in his practice and pattern reviewed the respective affidavits to see if they were signed and then to see or determine if probable cause existed in the affidavit such that the search warrant could be signed and the specific search authorized. The search warrant of Detective Rosenstein related to the search of the defendant's premises, his home.

The affidavit presented for each of those search warrants was signed and notarized by the respective detectives. After which the search warrant for penile swabs was executed at Sinai Sexual Assault Treatment Center. A search was made of the likely places where the signed affidavit and search warrant relating to the penile swabs might be. They were not in the Sheriff's Department's case folder for this particular investigation, they were not at I.A.D. that has a copy of that case folder within the Sheriff's Department, they were not within the D.A.'s Office, they were not within -- or the affidavit was not within the Sexual Assault Treatment Center's premises.

> Although the search warrant was. They were not within the Clerk's Office either, Exhibit 3 or 4. It's entirely unclear where the existence -- or where the location of exhibit -- strike that -- of what the signed affidavit of then Detective Santiago is.
>
> Mr. Howard should be completely satisfied that every stone was unturned, lifted up, inspected by [defense counsel], even pebbles were looked under, even gravel in pursuit of this post-conviction motion for a new trial.
>
> I'm satisfied that the State has met its burden to reconstruct the events relating to these affidavits -- or affidavit and search warrant, and accordingly, I deny that portion of the post-conviction motion that deals with the loss of the signed affidavit.
>
> Furthermore, because I have denied that, now I find that it would -- or I conclude that had a suppression motion been brought by trial counsel, it too would have been denied, and so there -- the second prong of the Strickland standard for ineffective assistance of counsel is not met, and correspondingly, as is the procedure, I do not address the first prong of it.

A. Howard has not demonstrated that he was prejudiced by the State's failure to produce the signed affidavit in support of the penile swab search warrant.

¶34 Howard has not met his burden of demonstrating that trial counsel's failure to file a pretrial motion to suppress the penile swab evidence on the ground that the State could not produce a signed affidavit in support of the warrant was prejudicial. Both Detective Santiago and Detective Rosenstein testified that Detective Santiago drafted the affidavit and that he signed the affidavit in the presence of a notary. Both detectives stated that they then took the signed and notarized affidavit to Judge Donegan, who reviewed it and issued the search warrant based on its contents. The trial court found the detectives' testimony to be credible, and it is the sole arbiter of a witness's credibility. *See* ***Ayala***, 331 Wis. 2d 171, ¶10. The trial court's credibility findings do not appear to be clearly erroneous, nor does Howard argue that they are. As such, we must conclude that

although the State lost the affidavit in support of the search warrant, there was sufficient evidence to support the trial court's conclusion that the search warrant for the penile swab was based on a signed affidavit establishing probable cause for the seizure of Howard's penile swab, and therefore, that Howard suffered no prejudice.

B. Howard's claim that the search warrant bears an unauthorized signature is raised for the first time on appeal.

¶35 Howard also alleges in his brief before this court that Judge Donegan's signature on the penile swab search warrant while "perhaps not literally forged" is "unauthorized, most likely by way of use of a stamp, or a clever copy and paste from some other document signed (or stamped) by Judge Donegan." The State counters that while Howard's postconviction counsel did ask Judge Donegan a few questions about the signature on the search warrant during the evidentiary hearing, he did not present a handwriting expert to provide an opinion that the signature on the penile swab warrant was not Judge Donegan's, nor did he provide any evidence that someone other than Judge Donegan signed the search warrant or somehow copied or placed Judge Donegan's signature on the warrant. In fact, at the close of the evidence, Howard did not argue that Judge Donegan had not signed the search warrant or that the search warrant did not bear an authorized signature. As such, the issue was not placed into controversy and the trial court did not rule on the issue.

¶36 In short, we agree with the State that Howard raises this issue for the first time on appeal, and therefore, we will not consider it. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Additionally, Howard does not reply to the State's argument that he failed to properly raise the issue before the trial court, and unrefuted arguments are deemed admitted. *See* ***Charolais***

Breeding Ranches v. FPC Secs. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

C. We need not address Howard's argument that the trial court erroneously exercised its discretion in permitting Judge Donegan to testify to his "usual practices."

¶37 Howard also complains that the trial court erred in permitting Judge Donegan, who did not remember signing the warrant three years earlier, to testify regarding his "usual practices." We need not address whether the trial court's decision to do so was erroneous because, even if it was, any error was harmless. The testimony from both Detectives Santiago and Rosenstein was sufficient to establish that a signed and notarized affidavit setting forth probable cause was presented to Judge Donegan in support of the search warrant. Judge Donegan's testimony was superfluous to any such finding by the court. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts should decide cases on narrowest possible grounds).

¶38 In sum, Howard has not demonstrated that his trial counsel was constitutionally ineffective for failing to challenge the penile swab search warrant.

III. Sexual Assault Nurse's Testimony.

¶39 Finally, Howard argues that the trial court erred in denying him an evidentiary hearing on his claim that his trial counsel should have objected to a statement made by the sexual assault nurse during trial on ***Haseltine*** grounds, that is, because she allegedly gave her opinion regarding M.R.'s truthfulness. Howard complains that his trial counsel should have objected to this exchange between the State and the nurse at trial:

> Q You had an adult woman presenting who had said a man had forced penis-to-vagina sexual intercourse, correct?
>
> A Yes.
>
> Q You see no injuries, correct?
>
> A I see --
>
> Q Other than the posterior fourchette, the one that is drawn?
>
> A Yes, that's correct.
>
> Q Is the absence of more injury a reason to disbelieve her story?
>
> A No.
>
> Q Why not?
>
> A Because the vaginal area, a women's genital areas, especially the vaginal area is very elastic. I kind of compare it to like a balloon. If you think of a balloon, if you don't blow air into it, it's collaps[i]ble. You know, you can take a balloon and put a tampon into it like the vagina. You can put a penis into it, all right. You can even put the head of a baby through the vagina. And there often, and through the cervix, there often is no injury to the vagina and to this whole area. That's a very normal finding.

¶40 Howard contends that the nurse's testimony was inadmissible pursuant to ***Haseltine***, which provides that "[n]o witness ... should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *See* ***Id.***, 120 Wis. 2d at 96. Howard believes that the prosecutor's questions were meant to elicit an opinion from the nurse on whether M.R. was telling the truth.

¶41 The trial court held that the nurse "did not testify that the witness was telling the truth, only that what occurred may not have resulted in 'more injury.'" We agree. The nurse performed a physical examination of M.R. and

testified about her observations; she did not testify that M.R. was telling the truth about the ultimate issue in the case—that Howard sexually assaulted her. Rather, the nurse simply testified that M.R.'s physical condition was not inconsistent with M.R.'s accusations.

¶42 It was neither deficient performance nor prejudicial for trial counsel to fail to raise a ***Haseltine*** objection to the nurse's testimony because such an objection would have been rejected as meritless. The trial court did not erroneously exercise its discretion in denying Howard's claim that his trial counsel was ineffective on those grounds without a hearing because the record conclusively demonstrates that Howard was not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9. As such, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.