COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1081-CR **Cir. Ct. No. 2011CF4656**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LITTLETON EMMETT JACKSON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Littleton Emmett Jackson appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree intentional homicide. He also appeals from the order denying his postconviction motion without a hearing. We affirm.

BACKGROUND

¶2 On September 25, 2011, Sherona Smith left her eleven-month-old daughter, M.S., with M.S.'s father, Jackson, while Smith went out around 5:15 p.m. to get M.S.'s bottle and milk. When Smith returned later that evening, she found M.S. on the floor, not breathing, with bruising and swelling around her face. Jackson was standing in front of the bathroom door, crying. He told Smith he "didn't do nothing," did not know what happened, and might get life in jail. M.S. died from her injuries.

¶3 M.S.'s death was ruled a homicide from multiple blunt-force injuries. The assistant medical examiner who testified at trial cataloged numerous injuries to M.S., including a healing fracture of the lower left leg; bruises and abrasions on the arms and legs, including two bruises caused by human bites; multiple bruises and abrasions to the torso; multiple rib fractures, some of which were new and some of which were healing; bruising of a lung; multiple bruises and abrasions to the head and face, including a black eye; nine hemorrhages below the scalp, consistent with nine separate instances of blunt-force trauma; bleeding and swelling of the brain; and hemorrhaging of the optic nerve and retina.

¶4 Jackson was charged with one count of first-degree intentional homicide. The case was tried to a jury, which was instructed on both the original charge and the lesser-included offense of first-degree reckless homicide. The jury convicted Jackson of first-degree intentional homicide. The circuit court sentenced him to life imprisonment with no eligibility for extended supervision.

¶5 Jackson filed a postconviction motion, alleging multiple instances in which trial counsel had been ineffective. After briefing, the circuit court denied the motion without a hearing. On appeal, Jackson contends this was an error and,

at a minimum, he is entitled to an evidentiary hearing on the motion. Additional facts will be discussed below as necessary.

DISCUSSION

A. Standards of Review

¶6 If a defendant's postconviction motion alleges, on its face, sufficient material facts which, if true, would entitle the defendant to relief, the circuit court must hold a hearing on the motion. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. However, "if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.*** Whether a motion is sufficient is a question of law we review *de novo*. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). A circuit court's discretionary acts are reviewed for an erroneous exercise of discretion. ***Id.*** at 311.

¶7 To prevail on an ineffective-assistance claim, the defendant must show both that counsel was deficient and that the deficiency was prejudicial. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To show deficient performance, "the defendant must identify specific acts or omissions … that fall 'outside the wide range of professionally competent assistance.'" *See* ***State v. Taylor***, 2004 WI App 81, ¶13, 272 Wis. 2d 642, 679 N.W.2d 893 (citation omitted). The test for prejudice is "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Balliette***, 2011 WI 79, ¶24, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). Claims of ineffective assistance of counsel presented mixed questions of fact and law. *See* ***State v. Thiel***, 2003 WI

111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. We uphold a circuit court's findings of fact unless clearly erroneous, but whether those facts show counsel was ineffective is a question of law. ***Id.***

B. Alleged Error #1: The Lamp

¶8 When Smith returned home, there were fresh dents in the wall. The neighbor from the adjacent apartment, told police she had heard two loud booms around 8 p.m. The State implied that Jackson may have hit M.S.'s head against the wall. Jackson complains that trial counsel was ineffective for not seeking to introduce evidence that there were shards of a broken lamp embedded in the wall dents to rebut the State's argument.

¶9 However, Jackson is incorrect when he claims that the jury "was never told of the lamp fragments found within the wall." Detective David Chavez testified at trial. The State had him describe multiple photos of the crime scene for the jury. When the State asked about exhibit 15, Chavez described it as showing "part of a lamp, part of the brass and it appeared to have been smashed into the drywall and stuck there…. It appeared to me that this thing was struck several times and then smashed and actually stuck into the wall." Thus, had defense counsel also introduced evidence of the lamp fragments in the wall, that evidence would have been cumulative.[1] Counsel is not ineffective for failing to introduce

[1] The circuit court rejected this postconviction challenge because Jackson "has not provided the court with any showing from a forensics lab that would support an argument the lamp caused the dents in the wall" and because there was no basis to find ineffectiveness "in the absence of some evidence linking the damaged lamp to the dents in the wall." We are not convinced that this justification holds up on review, but we affirm because we may rely on different reasoning than that utilized by the circuit court. *See* ***State v. Sharp***, 180 Wis. 2d 640, 650, 511 N.W.2d 316 (Ct. App. 1993).

cumulative evidence. *See* ***United States v. Jackson***, 935 F.2d 832, 845-46 (7th Cir. 1991).

C. Alleged Error #2: The Shirt

¶10 At the scene, police recovered one of M.S.'s t-shirts, which was later shown to have a small amount of Jackson's semen on it. Jackson complains that trial counsel should have objected to, or moved to suppress, that evidence. He asserts that because there was no objection or motion, the circuit court never balanced the probative value against possible prejudice. *See* WIS. STAT. § 904.03 (2011-12) (evidence may be excluded if probative value is outweighed by danger of unfair prejudice). Jackson argues that the semen evidence was not probative as to whether he killed M.S. and its end result was merely to inflame the jury.

¶11 It appears that the State is conceding that trial counsel was deficient for not challenging the shirt in some fashion; we will therefore assume without deciding that counsel was indeed deficient. Nevertheless, Jackson is not entitled to relief because the record conclusively reveals no prejudice.

¶12 The DNA analyst from the crime lab testified that M.S.'s oral, vaginal, and rectal swabs all tested negative for the presence of semen. Further, though there was apparently some anal bleeding noted, one of the State's medical experts testified that the bleeding was not caused by any form of sexual abuse and that there was no injury to M.S. that was indicative of sexual abuse.[2] Thus, despite the State introducing evidence that might hint at possible sexual assault, it

[2] The circuit court also explained that the shirt was "part of the scene which the court would not have excluded even if trial counsel had made an objection."

was the State's own witnesses who discredited that theory. Moreover, as we will discuss below, the evidence of Jackson's guilt is so overwhelming that our confidence in the verdict is not undermined.

D. Alleged Error #3: The Statements

¶13 As part of the investigation, a nurse swabbed Jackson's penis, presumably as a step towards investigating possible sexual assault. On cross-examination, the State questioned Jackson about certain statements he had made to police, like admissions he had previously bit and slapped M.S., that Jackson was now claiming were lies. Jackson explained he told those lies to police because both he and Smith were originally being held for investigation and Jackson, believing M.S. to still be alive, reasoned that if he took responsibility, Smith would be released and could take M.S. home. Otherwise, there would not be anyone to look after M.S.

¶14 This explanation led the State to ask Jackson whether he remembered "joking with [the nurse] about, should I make my … penis hard" for the swabbing and whether he recalled telling detectives, "[B]oy, I should be charged with rape more often so that I have to go through this procedure."[3] Jackson complains that trial counsel should have objected to or sought to suppress these statements for essentially the same reasons that he thought the shirt should have been excluded.

[3] Jackson explained that he did not make the first statement to the nurse, just to the detectives, and that the second statement was sarcastic.

¶15 The circuit court rejected this challenge. It noted that any objection "would have been overruled because the evidence went to the defendant's character and rebutted his testimony that he was only concerned about his daughter and Smith." Indeed, counsel is not ineffective for failing to raise a meritless objection. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶16 Moreover, recall that the test for prejudice requires a reasonable probability that, but for trial counsel's deficiency, the result of the trial would have been different, and that a reasonable probability is one sufficient to undermine our confidence in the verdict. *See* ***Balliette***, 336 Wis. 2d 358, ¶24. The evidence of Jackson's guilt in this case is so overwhelming that none of the three errors alleged, alone or in combination, undermines our confidence in the result.

¶17 Smith and Jackson's mother, who testified on his behalf, both testified that M.S. had been fine when each of them saw her earlier in the day. Smith testified that when she left the home, M.S. was dressed in a shirt and jeans, but was naked when she returned. Smith said that Jackson was standing in front of the bathroom door with his shirt off and blood around his neck, crying and stating he might get life in prison. Smith noticed new marks on the wall, a broken cookie jar in the kitchen, and bruising and swelling on M.S.'s face. She also said she had screamed, "My baby! My baby!" when she found M.S.

¶18 The adjacent neighbor testified that she heard two loud booms. She heard Smith scream, "My baby! My baby!" She also testified that she overheard Jackson tell Smith, "Don't say nothing." One of the first responders similarly testified that he heard Jackson say to Smith "something to the effect of, 'I wish you would have waited to call them. We needed to decide what to do here.'" One

of the officers who interviewed Jackson at the scene testified that Jackson said, "My little girl is dead, and I'm going to jail."

¶19 Three detectives conducted custodial interviews of Jackson. According to their testimony, Jackson gave the following explanations for M.S.'s injuries: (1) Jackson had six beers and passed out in the bedroom and, when he returned to the living room, he found her bleeding from the nose and mouth so he attempted the Heimlich maneuver and CPR and called 911; or (2) M.S. "took a hard spill;" or (3) he might have fallen asleep with M.S. and smothered her; or (4) he fell asleep with M.S. and elbowed her in the face and she fell off the couch to the floor; or (5) maybe he elbowed her multiple times; or (6) he hit M.S. and she fell, then he put her on the floor and went to the bathroom where he fell asleep on the toilet. Other statements Jackson made to the police including: volunteering, "pretty much out of the blue," that neither his urine nor semen would be found on M.S.'s shirt; asking one of the detectives, "Let's just say that I killed her. What would that make me[?]"; inquiring whether M.S. falling from the couch could have caused her injuries; admitting biting M.S., but not on the neck and chest where the clearest marks were; and admitting slapping M.S. with an open hand multiple times.

¶20 The medical examiner testified about M.S.'s injuries, as described above. Dr. Lynn Sheets, the director of the child abuse program at Children's Hospital of Wisconsin, also examined M.S. and prepared a report. The report noted the various bruises and scrapes, and stated that a CT scan revealed massive swelling and bleeding of the brain, which Sheets said was indicative of child abuse. The injuries led her to conclude to a reasonable degree of medical certainty that the injuries were from child abuse and had caused M.S.'s death.

¶21 When Jackson testified, he denied ever sleeping on the toilet. He said he left the apartment door open as he slept because Smith had lost her keys. He first said he thought he heard the door while he slept, then said he had not. Jackson denied hitting M.S. and, when asked about his admissions to police about hitting and biting M.S., explained that he had lied to them when making those admissions. Jackson was also asked about a letter he wrote to M.S. while he was in custody. It read, in part, "I hope you can find it in your heart to forgive me. I'm so sorry for what happened." Jackson denied that this was an admission because he "wouldn't incriminate [him]self that bad" and he claimed the letter actually referred to his alcohol use. On cross-examination, Jackson acknowledged that "I'm the only one that can explain this.… I was the only one there."

¶22 The evidence overwhelmingly indicates that Jackson is guilty of first-degree intentional homicide. There is nothing about the nature of M.S.'s fatal injuries or the circumstances of her death to suggest anything other than intentional conduct. Accordingly, the record reveals no prejudice and it conclusively demonstrates that Jackson is not entitled to relief on his postconviction motion. The circuit court properly exercised its discretion in denying the motion without a hearing.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).