COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP563 **Cir. Ct. No. 1999CF950**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO G. RAMIREZ, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: WILBUR E. WARREN, III, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Antonio Ramirez appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (2011-12)[1] motion alleging

[1] Unless otherwise indicated, all subsequent references to the Wisconsin Statutes are to the 2011-12 version.

ineffective assistance of postconviction counsel. We conclude that the circuit court properly denied the motion without an evidentiary hearing because there was no legal basis for the ineffective assistance claim. We affirm.

¶2 The circuit court has the discretion to deny a postconviction motion without an evidentiary hearing "if the record conclusively demonstrates that the movant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

¶3 In 2007, we affirmed Ramirez's conviction for two counts of sexual assault of a child. ***State v. Ramirez***, No. 2005AP2768-CR, unpublished slip op. (WI App Apr. 25, 2007). In that appeal, Ramirez challenged the circuit court's evidentiary ruling admitting at trial the out-of-court statements of Ramirez's wife and the victim that Ramirez assaulted the victim. ***Id.***, ¶15. These statements, made to police and hospital personnel, were admitted as excited utterances under WIS. STAT. § 908.03(2) (2005-06). ***Id.*** In affirming the circuit court's discretionary evidentiary ruling, we held:

> We review the trial court's determination to admit hearsay under the excited utterance exception for an erroneous exercise of discretion and give deference to the trial court's determination because it is best situated to weigh the reliability of the circumstances surrounding the declaration. ***State v. Gerald L.C.***, 194 Wis. 2d 548, 555, 535 N.W.2d 777 (Ct. App. 1995). Admissibility is dependent on the existence of a startling event and spontaneity of the statements while under the stress of the event. *See* ***State v. Moats***, 156 Wis. 2d 74, 97, 457 N.W.2d 299 (1990).
>
> Ramirez complains there is no showing of how much time passed between the alleged assault and the statement made in the car. Although the time between the triggering event and the utterance is the key factor, "'time is measured by the duration of the condition of excitement rather than mere time elapse from the event or condition described.'" ***Id.*** (quoted source omitted). Cynthia summoned her

> mother to pick her up from the apartment as her fight with Ramirez was still in progress. A police officer testified that when he interviewed Cynthia at her mother's home she was very emotional, sad and crying. Cynthia and the victim were taken to the hospital within the hour and both were described by hospital personnel as distraught, and very upset. This is a sufficient showing that the statements were made while still under the stress of the assault and its discovery. There was no error in the admission of Cynthia's and the victim's statements made in the hours following the assault.

Id., ¶¶16-17.

¶4 In August 2010, Ramirez filed the WIS. STAT. § 974.06 motion that is the subject of this appeal. He argued that postconviction counsel should have claimed that trial counsel was ineffective for not objecting to the out-of-court statements of Cynthia and the victim on confrontation grounds in light of ***Crawford v. Washington***, 541 U.S. 36 (2004).

¶5 The circuit court denied Ramirez's WIS. STAT. § 974.06 motion without an evidentiary hearing because ***Crawford*** did not apply and the out-of-court statements of Cynthia and the victim were properly admitted.

¶6 The circuit court correctly held that ***Crawford*** did not apply.[2] Ramirez was tried and sentenced in 2001. ***Crawford*** was decided in 2004, three years after Ramirez's trial. Therefore, trial counsel was not ineffective when she failed to object on ***Crawford*** confrontation grounds, and postconviction counsel was not ineffective for failing to challenge trial counsel's assistance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's

[2] In his reply brief, Ramirez concedes that ***Crawford*** does not apply to his case.

failure to raise a legal challenge is not deficient if the challenge would have been rejected).

¶7 In addition, the Supreme Court has held that ***Crawford*** does not apply retroactively in a collateral attack upon a conviction.[3] ***Whorton v. Bockting***, 549 U.S. 406, 417-21 (2007). Wisconsin law takes the same approach. ***State v. Lagundoye***, 2004 WI 4, ¶¶13-14, 268 Wis. 2d 77, 674 N.W.2d 526; ***State v. Burns***, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (1983) (state constitutional right to confront witnesses is the same as the federal constitutional right).

¶8 In Ramirez's direct appeal we affirmed the circuit court's discretionary decision to admit the out-of-court statements of Cynthia and the victim as excited utterances. Under the law in effect at the time of Ramirez's trial, ***Ohio v. Roberts***, 448 U.S. 56 (1980), abrogated by Crawford, 541 U.S. at 36, the excited utterances of Cynthia and the victim were properly admitted and did not violate Ramirez's confrontation rights. First, when an excited utterance is offered, proof of the declarant's unavailability is not required. ***State v. Searcy***, 2006 WI App 8, ¶55, 288 Wis. 2d 804, 709 N.W.2d 497. Second, although a defendant has a right to confront his or her accusers, ***id.***, ¶42, out-of-court statements that constitute a firmly rooted hearsay exception, such as excited utterances, bear adequate indicia of reliability sufficient to satisfy the defendant's confrontation rights. ***Roberts***, 448 U.S. at 66-67; ***State v. Ballos***, 230 Wis. 2d 495, 510, 602 N.W.2d 117 (Ct. App. 1999) (excited utterances are firmly rooted hearsay exceptions).

[3] A WIS. STAT. § 974.06 motion is a collateral attack on a conviction. ***State ex rel. Warren v. Schwartz***, 219 Wis. 2d 615, 648-49, 579 N.W.2d 698 (1998).

¶9 The circuit court properly denied Ramirez's WIS. STAT. § 974.06 motion without an evidentiary hearing because the "record conclusively demonstrates that the movant is not entitled to relief." ***Allen***, 274 Wis. 2d 568, ¶12.

By the Court.—Order affirmed.

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