COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1371-CR **Cir. Ct. No. 2009CF5700**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCOS ORDONIA-ROMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge.[1] *Affirmed.*

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

[1] The Honorable Jeffrey Conen was the judge in this case during the pretrial proceedings and the jury trial. The Honorable David Borowski was the judge for the postconviction motion.

¶1 HIGGINBOTHAM, J. Marcos Ordonia-Roman appeals a judgment of conviction on three counts of sexual assault of a child under sixteen years of age and a decision and order denying his motion for postconviction relief. Ordonia-Roman contends: (1) he was denied the effective assistance of counsel because counsel had a conflict of interest that adversely affected counsel's performance and therefore Ordonia-Roman is entitled to the presumption that counsel's conflict of interest prejudiced him under ***Cuyler v. Sullivan***, 446 U.S. 335 (1980), and ***State v. Kaye***, 106 Wis. 2d 1, 315 N.W.2d 337 (1982); (2) the circuit court judge erred in not recusing himself, based on allegations that the judge was biased against both counsel and Ordonia-Roman; (3) the circuit court erred in declining to admit evidence at trial regarding the process by which Ordonia-Roman was interrogated and Ordonia-Roman's initial claims that he did not commit the crimes charged; and (4) Ordonia-Roman was denied the effective assistance of counsel because defense counsel's attempts to elicit evidence about the interrogation process and Ordonia-Roman's initial denials were inadequate. For the reasons we explain, we reject Ordonia-Roman's arguments and affirm.

BACKGROUND

¶2 A criminal complaint was filed against Ordonia-Roman based on allegations by the daughter of Ordonia-Roman's girlfriend that Ordonia-Roman had sexual intercourse with her when she was eight and ten years old and that he had sexual contact with her in November 2009, when she was thirteen years old. Ordonia-Roman voluntarily met with police regarding the allegations against him. He was first interviewed by Detective James Ortiz. During that interview, Ordonia-Roman denied that he had any sexual contact with the victim. Detective Ortiz did not testify at trial.

¶3 The following day, Detective Matthew Quist interviewed Ordonia-Roman twice. During the first interview, Ordonia-Roman denied having sexual intercourse with the victim when she was eight and ten years old. However, during the second interview, Ordonia-Roman confessed that he had sexual intercourse with the victim several times in May 2009, when the victim was thirteen years old. Ordonia-Roman also told Detective Quist that he had sexual contact with the victim in November 2009, but denied compelling or forcing her to have sexual contact. He claimed that the victim initiated sexual contact and that he resisted her efforts to "seduce" him. Ordonia-Roman testified at trial that he confessed to having sexual intercourse with the victim in May 2009 because the detective indicated to him that the interrogations would end if he confessed.

¶4 Based on the above, Ordonia-Roman was charged with three counts of second-degree sexual assault of a child under sixteen years of age. The State did not charge Ordonia-Roman in this case for the sexual assaults that allegedly occurred in May 2009.

¶5 Defense counsel filed a motion to suppress Ordonia-Roman's confession, on the ground that "[d]uring the interrogation [by Detective Quist] … Ordonia-Roman was without his required medication and was not allowed to take any." As later became evident, the medication at issue was for high blood pressure. The motion also stated that, "Ordonia-Roman was not in his right mind and did not fully understand what was going on."

¶6 A hearing was held on the motion to suppress on two separate days. On the second day, which was also the first day of trial, Ordonia-Roman testified. During his testimony, Ordonia-Roman stated that he had not taken any blood pressure medication in over five years. After Ordonia-Roman's testimony, the

court heard oral arguments by the prosecutor and defense counsel. Shortly after defense counsel began his argument, the court and counsel engaged in an exchange concerning Ordonia-Roman's history of using blood pressure medication, including whether he was taking the medication at the time of the interrogations, and whether he was denied access to this medication by Detective Quist.

¶7 During this exchange, the court asked counsel whether the allegation in the suppression motion that Ordonia-Roman was not "allowed" to take blood pressure medication during the interrogations was not true in light of Ordonia-Roman's testimony that he had not taken the medication for over five years. In response, defense counsel explained to the court that the use of the word "allow" in the suppression motion was "the wrong word," but that he never intended to mislead the court when counsel alleged in the suppression motion that Ordonia-Roman was not "allowed" to take medication during the interrogations.

¶8 The court probed defense counsel about whether counsel knew when he filed the motion that Ordonia-Roman had not been taking blood pressure medication for several years prior to the interrogations. After conferring with Ordonia-Roman, counsel informed the court that Ordonia-Roman told counsel during prior attorney-client communications that a doctor at a clinic on 16th Street *prescribed* Ordonia-Roman blood pressure medication "in the fairly recent past." Counsel also stated to the court that Ordonia-Roman was now telling counsel that Ordonia-Roman did not *obtain* his blood pressure medication because he did not have insurance. Following additional questioning by the court, counsel stated that "the information I had … is that [Ordonia-Roman] was prescribed medications. I took that to mean he was on prescribed medications" at the time of the interrogations. Elaborating on this difference between obtaining a prescription

and obtaining actual medications, counsel explained that, "the information I had is that [Ordonia-Roman had] in the not-too-distant past … been prescribed high blood pressure medication from a doctor. That's the information I had."

¶9 This prompted the court to observe that Ordonia-Roman appeared to be telling the truth when he testified at the suppression hearing that he had not taken blood pressure medication in over five years because that testimony only served to undermine the thrust of the suppression motion. The court asked, rhetorically, why Ordonia-Roman would lie about not having taken any such medications in five years. Counsel responded, also rhetorically, "I don't know. Ask [Ordonia-Roman], Your Honor. I'm sorry."

¶10 Later in the hearing, after the circuit court denied the motion to suppress and after counsel again consulted with Ordonia-Roman, counsel informed the court that based on the court's "very disparaging" comments, he did not feel that Ordonia-Roman would receive a fair trial because of the judge's "personal bias" against both counsel and Ordonia-Roman. The judge denied Ordonia-Roman's implicit request that the judge recuse himself, stating that he felt he could be "fair and impartial through the entire case" and that his remarks to counsel during the exchange at the suppression hearing were justified.

¶11 Addressing the earlier exchange between the court and defense counsel, counsel told the court that, during that exchange, he felt that he was "put in a position where [he] had to come forward and tell the [c]ourt" what Ordonia-Roman divulged to him during attorney-client communications in order to "exonerate" himself. When asked by the court whether counsel investigated the claims that Ordonia-Roman made to him, counsel stated that he could not obtain records from the 16th Street clinic, but that jail records showed that Ordonia-

Roman was taking blood pressure medication in jail. Counsel stated that he drafted the suppression motion based on what Ordonia-Roman told him and that "at some point, I take my client's word … that's my view of the facts."

¶12 The case proceeded to a jury trial. At the close of the State's evidence, the trial court placed on the record the substance of several side-bar discussions with the prosecutor and defense counsel. The side-bar discussions concerned the admissibility of evidence regarding the events that transpired before Ordonia-Roman confessed to Detective Quist that he had sexual intercourse with the victim in May 2009, namely, that Ordonia-Roman was first interviewed by Detective Ortiz and in that interview denied committing the charged crimes. The court sustained the State's objection to admitting this evidence on the grounds that the proffered testimony constituted hearsay and was irrelevant.

¶13 The jury convicted Ordonia-Roman of all three counts. Ordonia-Roman filed a postconviction motion alleging that defense counsel was ineffective in two respects: (1) the exchanges during the suppression hearing summarized above between the court and defense counsel created an actual conflict of interest on the part of counsel in which counsel advanced his interest in protecting his professional integrity by revealing attorney-client privileged information; and (2) counsel failed to adequately explain to the court why the evidence regarding the interrogation process and Ordonia-Roman's initial denials was relevant and admissible. The court denied the motion without a hearing. Ordonia-Roman appeals.

DISCUSSION

I. Conflict of Interest

¶14 Ordonia-Roman contends that he was denied his Sixth Amendment right to the effective assistance of counsel because defense counsel had a conflict of interest that adversely affected his performance. According to Ordonia-Roman, counsel's conflict of interest arose when, during the suppression hearing, counsel became involved in what Ordonia-Roman characterizes as "heated" exchanges with the court. As we have explained, the exchanges focused on the assertion in the motion to suppress that Ordonia-Roman was taking blood pressure medication at the time he was interrogated by Detective Quist and that the detective did not "allow" Ordonia-Roman to take his medication. Ordonia-Roman frames his entire argument in the following way:

> During the suppression hearing, the trial judge aggressively attacked defense counsel's honesty and professional integrity. The judge said that he had been 'misled for the last month' by defense counsel, first by counsel's false statements in the motion to suppress, then by counsel lying to the court and eliciting perjured testimony at the suppression hearing. Defense counsel took these attacks personally, and sought to defend himself. He did so—as he himself admitted at the suppression hearing—by blaming the situation on his client. [Counsel] said that the judge had forced him into 'exonerating' himself, and that he had done so by divulging confidential attorney-client conversations, and by telling the Court that his client, unbeknownst to counsel, had decided to testify falsely. This was the only way for counsel to convince the judge that it was Ordonia-Roman—not counsel—who had behaved dishonestly.

(Citations omitted.)

¶15 Ordonia-Roman sums up his argument by asserting that this was a situation where "'the defense attorney was required to make a choice advancing

his own interests to the detriment of' the defendant's," quoting ***United States v. Horton***, 845 F.2d 1414, 1419 (7th Cir. 1988). He maintains that "[c]ounsel chose to advance his own interest—defending his professional integrity—to the detriment of Ordonia-Roman" and that counsel's conflict of interest affected counsel's performance "because it led directly to counsel telling the court that his client had lied, either to counsel or during his testimony."

¶16 Regarding whether Ordonia-Roman must show that counsel's conflict of interest was prejudicial, he argues that, because counsel had an actual conflict of interest that adversely affected counsel's performance, under ***Cuyler*** and ***Kaye***, he is relieved of proving prejudice under the analytical framework for assessing an ineffective assistance of counsel claim, as set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶17 We conclude that Ordonia-Roman has not shown that counsel had a conflict of interest.[2] We first observe that Ordonia-Roman's arguments are not fully developed. He makes conclusory and unsupported assertions that defense counsel had a conflict of interest because he divulged privileged attorney-client communications and informed the court that Ordonia-Roman perjured himself. Moreover, those assertions include clear distortions of the record. For example, the court did not state that counsel had elicited perjured testimony at the suppression hearing. To the contrary, the court repeatedly pressed counsel to explain how, if Ordonia-Roman's testimony was true, which appeared to the court to be the case, the motion filed by counsel could have any merit. In the end,

[2] Because we conclude that Ordonia-Roman has not shown that defense counsel had a conflict of interest, we do not reach the legal question of whether Ordonia-Roman is relieved of the burden of proving prejudice.

Ordonia-Roman utterly fails to support his contentions with any analysis of the exchanges between the court and defense counsel, or to explain why, based on specific portions of those exchanges, the record supports Ordonia-Roman's contention that counsel had a conflict of interest.

¶18 To the extent that Ordonia-Roman may develop an argument, he makes only one specific reference to the record in support of his contention that defense counsel had a conflict of interest. The cited portion of the hearing transcript states as follows:

> [THE COURT:] The bottom line that I told you before was I knew nothing about the fact that your client did not and was not taking medication for five years.
>
> ….
>
> [COUNSEL]: [There] was nothing I could do about the information that was given me, Your Honor; and that's the objection I had.
>
> I felt too I was put in a position where I had to come forward and tell the Court what my client told me in our one-on-one conversations before today's motion just to exonerate … myself is really what it boiled down to, with the indication being that now he's up there not telling the truth. That was very uncomfortable.
>
> And, you know, any time anybody wants to sit down and behind closed doors and ask me what happened here, I'd be glad to let them know; and I don't think it's anything that Your Honor thinks it is …
>
> THE COURT: What part of filing a motion with misleading information is not serious?
>
> [COUNSEL]: I had one sentence in there, Your Honor ….

¶19 This passage certainly does not put counsel in a flattering light.[3] However, a fair reading of the above quote does not support Ordonia-Roman's contentions that counsel put Ordonia-Roman at a disadvantage in response to the court's inquiries, or that counsel told the court that Ordonia-Roman testified falsely without counsel's knowledge.

¶20 Moreover, no other portion of the transcript, properly read, indicates that, during the exchanges, counsel was attempting to convince the court that it was Ordonia-Roman, not counsel, "who had behaved dishonestly." Although counsel conveyed to the court after consulting with Ordonia-Roman that the allegation in the suppression motion that Ordonia-Roman was not allowed to take blood pressure medication was based on information provided by Ordonia-Roman, the hearing transcript does not reflect that counsel conveyed to the court that Ordonia-Roman "behaved dishonestly" by providing misinformation to counsel during attorney-client communications or by providing false testimony at the suppression hearing. Indeed, the record reflects that, after counsel conferred with Ordonia-Roman on how to respond to the court's questioning, counsel informed the court that Ordonia-Roman had been *prescribed* medication recently, but that he did not *obtain* the medication because he did not have insurance to pay for it. Properly read, the transcript shows that counsel suggested to the court that counsel himself erred in alleging that Ordonia-Roman was not "allowed" to take blood pressure medication during the interrogations and that the allegation in the

[3] While in itself, counsel's statement, "And, you know, any time anybody wants to sit down and behind closed doors and ask me what happened here, I'd be glad to let them know," was a highly unprofessional comment, Ordonia-Roman fails to explain why this or any related statement by counsel constituted a conflict of interest.

suppression motion was based on a misunderstanding between counsel and Ordonia-Roman, and not because Ordonia-Roman "behaved dishonestly."

¶21 Ordonia-Roman contends in the reply brief that this same portion of the transcript supports the contentions that "counsel saved himself by accusing his client of dishonesty" and that "[c]ounsel admitted on the record at the suppression hearing that these divided loyalties had influenced his conduct." Once again, we do not find support for Ordonia-Roman's contentions in the cited passage in the hearing transcript, or in any part of the exchanges between counsel and the court.

¶22 Accordingly, we conclude that Ordonia-Roman has failed to support his contention that he was denied the effective assistance of counsel because counsel had a conflict of interest. We now turn our attention to the remainder of Ordonia-Roman's arguments.

B. Recusal

¶23 Ordonia-Roman argues that Judge Jeffrey Conen[4] erred in declining to recuse himself because "a reasonable objective observer would have questioned the trial judge's ability to remain impartial toward Ordonia-Roman and his attorney."[5] We disagree.

[4] In this section of the opinion, we refer to the circuit court judge by his name because claims of judicial bias are personal to the particular judge, rather than an attack on the court itself.

[5] We observe that Ordonia-Roman did not claim in his postconviction motion that the judge erred in not recusing himself from presiding over the trial. Ordinarily, we do not address arguments that have not been raised in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. However, this rule is one of judicial administration and we may choose to address an issue raised for the first time on appeal when the issue presents a question of law that does not require further fact finding to resolve. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (judicial administration); *see also* ***Helgeland v. Wisconsin Muns.***, 2006 WI App 216, ¶9 n.9, 296 Wis. 2d 880, 724 N.W.2d 208 (question of (continued)

¶24 The right to an impartial judge invokes the fundamental principles of due process under the United States and Wisconsin Constitutions. *See* ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. It is presumed that a judge has acted fairly, impartially, and without bias. ***Id.*** However, this is a rebuttable presumption. ***Id.*** To overcome the presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased. ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). To determine whether a defendant has rebutted that presumption, we must apply both a subjective and objective test. ***Id.*** Here, there is no dispute that Judge Conen was not subjectively biased. Thus, we address only whether Judge Conen was objectively biased. Whether the judge was objectively biased is a question of law, subject to de novo review. ***State v. Pirtle***, 2011 WI App 89, ¶34, 334 Wis. 2d 211, 799 N.W.2d 492.

¶25 Objective bias exists where there is an appearance of bias or the objective facts show that the judge treated the defendant unfairly. ***Goodson***, 320 Wis. 2d 166, ¶9. There is an appearance of bias "whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to" remain impartial under the circumstances. ***State v. Gudgeon***, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114. A judge who makes negative comments, including "expressions of impatience, dissatisfaction, annoyance, and even anger," may be trusted to remain impartial under the circumstances, except where such comments could

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law). We also note that the State did not argue forfeiture on appeal. Because the issue of whether the judge erred in not recusing himself raises a question of law that invokes core principles of due process, we choose to address Ordonia-Roman's recusal argument.

cause a reasonable person to question the judge's impartiality. ***Pirtle***, 334 Wis. 2d 211, ¶34 (quoting another source); ***Goodson***, 320 Wis. 2d 166, ¶9.

¶26 Ordonia-Roman argues that Judge Conen should have recused himself because a reasonable objective observer could have questioned the judge's ability to be impartial to defense counsel and to Ordonia-Roman. In support, Ordonia-Roman points to the judge's comments to defense counsel regarding what the judge viewed as a misleading allegation in the suppression motion that Ordonia-Roman was not allowed to take blood pressure medication during the interrogations. We are not persuaded.

¶27 A reasonable objective observer would understand that the judge reasonably perceived the suppression motion as misleading. Candor toward the court is required under our system of justice. *See* SCR 20:3.3(a)(1). The integrity of the adjudicative process is at risk when a lawyer makes false statements of fact or law to the court. As we have indicated, Judge Conen reasonably believed that counsel had filed a motion utterly lacking in a factual basis based on the apparent inconsistency between Ordonia-Roman's testimony at the suppression hearing that he had not taken the medication for over five years and the allegation in the suppression motion that Ordonia-Roman was not allowed to take his medication. A reasonable objective observer would not conclude that the judge was biased based on the judge's exchange with counsel about the inconsistency.

¶28 Ordonia-Roman also argues that the circumstances surrounding the exchanges between the circuit court and defense counsel indicate the "potential" for partiality toward Ordonia-Roman. This argument rests on Ordonia-Roman's view that defense counsel conveyed to the court that it was Ordonia-Roman's

dishonesty that resulted in counsel making a false allegation in the suppression motion, a view that we rejected above.

¶29 In addition, the State correctly points out that, under ***State v. Walberg***, 109 Wis. 2d 96, 106-07, 325 N.W.2d 687 (1982), bias against counsel ordinarily does not equate to bias against the defendant. Ordonia-Roman disagrees with this statement of law and argues in his reply brief that ***Walberg*** does not stand for that "rather broad declaration" because the federal seventh circuit court of appeals reversed our supreme court's decision on federal habeas review in ***Walberg v. Israel***, 766 F.2d 1071, 1077-78 (7th Cir. 1985). Ordonia-Roman misreads ***Israel***.

¶30 It is true that the federal circuit court concluded in ***Israel*** that the trial judge's bias against counsel constituted bias against the defendant. However, the court's ruling was specific to the facts of that case. ***Id.*** We do not read the court in ***Israel*** as suggesting that a judge's bias against counsel equates to bias against the defendant under ordinary circumstances. We note that the converse, that bias against counsel does not ordinarily equate to bias against the defendant, continues to be the law in Wisconsin, as reflected in decisions issued by Wisconsin appellate courts after ***Israel***. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 894, 467 N.W.2d 555 (Ct. App. 1991) ("The judge's bias against counsel must be severe in order to translate into partiality against the litigant.").

¶31 Although there may have been some "antagonism or … a strained relationship" between Judge Conen and defense counsel, a "strained relationship" alone is insufficient to require recusal. ***Walberg***, 109 Wis. 2d at 107. We conclude that the exchanges between the court and counsel did not create the

appearance of bias because nothing about Judge Conen's comments "reasonably call into question [his] impartiality toward" Ordonia-Roman. ***Id.***

¶32 Ordonia-Roman appears to also argue that Judge Conen demonstrated actual bias toward Ordonia-Roman. In support, Ordonia-Roman points to a portion of the trial transcript where the prosecutor was cross-examining Ordonia-Roman, and the judge interrupted the cross-examination twice to state on the record that Ordonia-Roman answered a question posed by the prosecutor before the interpreter translated the question in English. Ordonia-Roman takes the view that Judge Conen made those remarks on the record to suggest to the jury that Ordonia-Roman was not credible because he understood English better than he was "letting on."

¶33 The State argues that, because the court reporter transcribed only what was said in English and not what was said in Spanish, Judge Conen's statements on the record that Ordonia-Roman answered questions before the interpreter translated them were necessary to "clarify[] the record for the benefit of a reviewing court." From the State's perspective, the purpose of Judge Conen's statements on the record was to clarify what otherwise would not have been apparent from the transcript, rather than to attack Ordonia-Roman's credibility. We agree.

¶34 Ordonia-Roman's contention that the court intended to question Ordonia-Roman's credibility by making a record of Ordonia-Roman's ability to understand some English is unsupported by the record. By stating on the record that Ordonia-Roman had answered some of the prosecutor's questions before the questions were translated, the court was ensuring that an accurate record was made for meaningful appellate review. Thus, Ordonia-Roman has failed to establish by

a preponderance of the evidence that the circuit court treated Ordonia-Roman unfairly by making a record of the fact that Ordonia-Roman could understand some English.

¶35 In sum, we conclude that Ordonia-Roman has not met his burden to show that Judge Conen's comments during the exchanges with defense counsel at the suppression hearing created the appearance of bias. We further conclude that Ordonia-Roman has not met his burden to prove that Judge Conen treated him unfairly based on Judge Conen's statements at trial that the record should reflect that Ordonia-Roman answered questions posed by the prosecutor before the interpreter translated them. Accordingly, we reject Ordonia-Roman's claim that Judge Conen erred in not recusing himself from the case.

C. Circuit Court Ruling Declining to Admit Evidence about the Interrogations

¶36 As we have indicated, defense counsel sought to elicit testimony during counsel's cross-examination of Detective Quist regarding Ordonia-Roman's initial denials that he committed the charged crimes and the interrogation process leading up to Ordonia-Roman's admission to Detective Quist that Ordonia-Roman had sexual intercourse with the victim several times in May 2009. The State objected to the admission of such evidence, and the circuit court sustained the objection on relevancy grounds.[6]

[6] The circuit court also sustained the objection on hearsay grounds, stating that "[t]he law does not allow a defendant to bootstrap in his testimony without taking the stand" and that it would be "unfair to allow [Ordonia-Roman] to testify without [actually] testifying or without being subject to cross-examination." The requested evidence is not hearsay on the grounds articulated by the court because Ordonia-Roman did decide to testify.

¶37 Ordonia-Roman argues that the evidence regarding the interrogation process and Ordonia-Roman's initial claims to Detective Ortiz that he did not commit the charged crimes was relevant and therefore admissible. Ordonia-Roman contends that this evidence would have supported his defense theory that he confessed to having sexual intercourse with the victim in May 2009 only after the "stress of interrogation" and after Detective Quist promised that "confessing would result in leniency."

¶38 We understand Ordonia-Roman to be arguing that, had the jury heard Ordonia-Roman's evidence regarding the interrogation process and his initial denials to Detective Ortiz, a reasonable jury would have credited Ordonia-Roman's testimony that he confessed only because he was pressured into doing so and therefore found him not guilty of the charged crimes.

¶39 Assuming without deciding that evidence of the interrogation process and of Ordonia-Roman's initial denials was relevant and admissible, we conclude that any court error was harmless. Alleged evidentiary errors are subject to harmless error analysis. ***State v. Keith***, 216 Wis. 2d 61, 75, 573 N.W.2d 888 (Ct. App. 1997). An error is harmless if there is not a reasonable probability that the alleged error contributed to the conviction. ***State v. A.H.***, 211 Wis. 2d 561, 569, 566 N.W.2d 858 (Ct. App. 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. ***State v. Jackson***, 2014 WI 4, ¶87, 352 Wis. 2d 249, 841 N.W.2d 791. Whether an alleged error is harmless presents a question of law, subject to de novo review. ***State v. Beamon***, 2011 WI App 131, ¶7, 336 Wis. 2d 438, 804 N.W.2d 706.

¶40 We are not persuaded that there is a reasonable probability that the assumed error in excluding the evidence contributed to the outcome of the case. It

is not reasonable to believe that, had this evidence been admitted, it would have bolstered Ordonia-Roman's credibility to the extent that the jury would have believed his entire defense theory—that he confessed because he was promised that he would be treated "leniently" if he confessed. In other words, there is not a reasonable probability that a jury, having heard the victim's testimony and Detective Quist's testimony, would have ignored that evidence and found Ordonia-Roman not guilty of the charged crimes.

¶41 We also conclude that there is not a reasonable probability that the assumed error contributed to the outcome because the jury was alerted to the fact that Ordonia-Roman denied committing any of the charged crimes during the interrogations. Ordonia-Roman's own testimony at trial informed the jury that he was interviewed by two detectives; that he told the first detective that he did not commit the charged crimes; and that, although he initially denied committing the charged sexual assaults to the first detective, he confessed to Detective Quist that he had sexual intercourse with the victim in May 2009. Ordonia-Roman testified that he made this confession because Detective Quist made false promises to him. In his appellate brief, Ordonia-Roman asserts that it was important to elicit evidence on this topic from Detective Quist because Ordonia-Roman's testimony alone on this evidence would not be viewed as credible by the jury. The problem with this argument, however, is that Ordonia-Roman does not explain why this is so, given that the State never suggested during its cross-examination of Ordonia-Roman that Ordonia-Roman was lying when he testified that he was interviewed by two detectives and that he told the first detective that he did not commit the charged crimes.

D. Counsel's Failure to Elicit Evidence about the Interrogations

¶42 In a related argument, Ordonia-Roman argues that counsel was ineffective because counsel did not adequately argue to the court that evidence regarding the interrogation process and Ordonia-Roman's initial denials were relevant and admissible under the rule of completeness. Ordonia-Roman also argues that counsel was ineffective because counsel failed to seek to introduce this evidence after Ordonia-Roman decided to testify at trial.

¶43 We have already concluded that any court error in excluding evidence of the interrogation process and of Ordonia-Roman's initial denials was harmless. Because any error was harmless, Ordonia-Roman cannot demonstrate that he was prejudiced by counsel's failure to elicit this testimony. *See* ***State v. Eison***, 2011 WI App 52, ¶11, 332 Wis. 2d 331, 797 N.W.2d 890 (harmless error test essentially consistent with test for prejudice in an ineffective assistance of counsel claim). Accordingly, we reject Ordonia-Roman's argument that he was denied the effective assistance of counsel because counsel failed to elicit the requested evidence.

CONCLUSION

¶44 For the reasons explained above, we reject Ordonia-Roman's arguments and affirm the judgment of conviction and order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.