COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP1362-CR **Cir. Ct. No. 2013CF001191**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN BEAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY E. TRIGGIANO and LINDSEY C. GRADY, Judges. *Affirmed.*

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

¶1 BRENNAN, J. John Beal appeals from a judgment of conviction entered after a jury found him guilty of aggravated battery with substantial risk of great bodily harm while using a dangerous weapon (domestic abuse) and from the

order denying his motion for postconviction relief.[1] Beal argues that the postconviction court erred when it denied, without a hearing, his claim that his trial counsel was constitutionally ineffective for telling the jury during opening statements that Beal would testify, when Beal ultimately chose not to testify. Because we conclude that Beal's postconviction motion was insufficient to entitle him to a hearing, we affirm.

BACKGROUND

¶2 On March 13, 2013, the State filed a criminal complaint, charging Beal with aggravated battery with substantial risk of great bodily harm while using a dangerous weapon (domestic abuse). The complaint arose from incidents occurring on March 9, 2013.

¶3 According to the complaint, on March 9, 2013, Beal grabbed his girlfriend, A.H., punched her in the face and head, and stabbed her in the side and back of the head with a Swiss Army knife. The complaint further alleged that there was a silver piece of metal within the wound on the side of A.H.'s head.

¶4 A jury trial occurred on June 5-7, 2013. During the State's opening statement, the prosecutor told the jury that the evidence would show that A.H. heard Beal say, "I'm going to kill that bitch," after Beal found computer history that led him to believe that A.H. was being unfaithful to him. Later that day, while Beal and A.H. were walking to a store, Beal saw a police car and assumed A.H. had called the police on him. Beal then attacked A.H.

[1] The Honorable Mary E. Triggiano presided over the jury trial and entered the judgment of conviction, while the Honorable Lindsey C. Grady presided over postconviction proceedings and entered the order denying Beal's postconviction motion.

¶5 Following the State's opening statement, Beal's attorney told the jury that the evidence would reveal a different version of events. Beal's attorney told the jury that "[i]t will be Mr. Beal's testimony" that A.H. possessed the knife, not him, and that A.H. became upset and pulled the knife after Beal put his arm around her. Beal's attorney further alleged that A.H. was injured by the knife while Beal tried to avoid being stabbed.

¶6 Contrary to defense counsel's opening statement, Beal did not testify at trial, and the defense rested without calling any witnesses. During closing arguments, Beal's attorney explained the change in strategy thusly:

> I told you in opening that Mr. Beal may testify and what he might testify to. And then came trial. The State finished its case; Mr. Beal didn't testify. You may be wondering what he would have said. You may be wondering what he would have told you. But, remember, he has no obligation to testify. He has no burden. He has no responsibility to take the stand and explain what occurred and defend himself because the presumption of innocence rests with him. The burden of proof rests with the State. State finished its case. The assessment made by defense was the burden of proof wasn't met, that, therefore, State hasn't proved its case. Mr. Beal has nothing he needs to testify to, explain to you. And in the closing argument that I'm going to give to you, I'm going to show you why the State hasn't met its burden of proof. Therefore, when you go up to deliberate, the information as presented to you isn't sufficient for you to come back with a verdict of guilty because the State hasn't met its proof.

¶7 The jury found Beal guilty of battery with substantial risk of great bodily harm while using a dangerous weapon. The trial court sentenced Beal to seven years of initial confinement, followed by three years of extended supervision.

¶8 Beal filed a motion for postconviction relief, arguing ineffective assistance of counsel by his trial attorney.[2] In his motion, Beal claimed that his trial attorney performed deficiently by telling the jury during his opening statement that Beal would testify, when Beal ultimately did not testify. Beal argued that his trial attorney's broken promise undermined the confidence in the reliability of the verdict and prejudiced him. The postconviction court denied Beal's motion without a hearing. Beal appeals.

DISCUSSION

¶9 Beal claims that the postconviction court erred when it denied his postconviction motion without a hearing. He believes that his motion set forth sufficient facts, which, if true, demonstrated that his trial counsel's performance was constitutionally ineffective because counsel told the jury during his opening statement that Beal would testify but Beal did not testify. Because we conclude that Beal failed to allege facts in his postconviction motion to show that his attorney's performance was deficient, we affirm.

¶10 A postconviction claim of ineffective assistance of counsel must show that counsel's performance was deficient and also that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show "that

[2] In his postconviction motion, Beal raised a second ineffective-assistance-of-counsel claim, arguing that his trial counsel should have called Beal's niece to testify at trial. Beal has not renewed that argument on appeal and we deem it abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To demonstrate prejudice, "[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." ***Id.*** at 694. If a defendant fails to satisfy one prong of the ineffective assistance of counsel test, we need not address the other. ***Id.*** at 697.

¶11 A postconviction claim of ineffective assistance of counsel requires an evidentiary hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "However, 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 [postconviction] court has the discretion to grant or deny a hearing." ***Id.*** We independently determine whether the facts set forth in a postconviction motion require an evidentiary hearing. ***Id.*** If they do not, we review a postconviction court's decision as to whether to hold a hearing for an erroneous exercise of discretion. ***Id.***

¶12 Having reviewed the record, including Beal's postconviction motion, we conclude that the postconviction court correctly denied his motion without a hearing because Beal did not set forth sufficient facts that, if true, demonstrate that his trial counsel's performance was deficient.

¶13 An attorney does not perform deficiently by telling the jury, during opening statements, that a defendant is going to testify if the defendant has told counsel that he or she wants to testify. *See* ***State v. Krancki***, 2014 WI App 80, ¶¶9-11, 355 Wis. 2d 503, 851 N.W.2d 824. As such, to show deficient

performance, Beal must allege that he never told his attorney that he wanted to testify. But he includes no such allegation in his postconviction motion.

¶14 In his postconviction motion, Beal does not allege either: (1) that he did not intend to testify when the trial began; or (2) that he told his trial counsel that he did not intend to testify. Rather, Beal states in his postconviction motion:

> Trial counsel told [postconviction] counsel that he did not remember that he had made an unequivocal promise to the jury. Indeed, trial counsel said that he never intended on having Mr. Beal testify. Trial counsel concluded well before trial that Mr. Beal would make a poor witness, because Mr. Beal insisted on testifying about irrelevant and odd details. … nothing unforeseeable occurred during trial that would justify counsel's change in tactics.

This statement is insufficient to entitle Beal to an evidentiary hearing.

¶15 Beal makes much of the fact that trial counsel allegedly stated "that he never intended on having Mr. Beal testify." However, trial counsel's intent is irrelevant because trial counsel could not waive Beal's right to testify. *See* ***State v. Albright***, 96 Wis. 2d 122, 130-33, 291 N.W.2d 487 (1980) (counsel cannot waive defendant's right to testify if defendant expressly refuses to waive it). It is Beal's intent at the time of counsel's opening statement that matters. In order to be entitled to an evidentiary hearing, Beal needed to allege that he told his trial counsel that he did not intend to testify but that counsel told the jury Beal would testify anyway. Beal did not make those allegations in his postconviction motion.

¶16 Furthermore, Beal claims in his postconviction motion that trial counsel said that he did not intend to have Beal testify because Beal "insisted on testifying about irrelevant and odd details." That statement suggests that Beal told trial counsel that he *did* want to testify. If so, trial counsel did not perform deficiently when telling the jury during opening statements that Beal intended to

testify because such a statement would have been true at the time counsel made it. *See* ***Krancki***, 355 Wis. 2d 503, ¶¶9-11. As such, Beal's postconviction motion does not just fail to show that he would be entitled to relief, but may actually show that he is not entitled to relief because his attorney acted reasonably when he told the jury that Beal was going to testify.

¶17 In sum, we affirm the postconviction court's order denying Beal's postconviction motion without a hearing because Beal did not plead sufficient facts to demonstrate that he is entitled to relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶18 KESSLER, J. (*concurring).* Defense counsel's opening statement representation that Beal would testify ("'[i]t will be Mr. Beal's testimony'") was a minor part of the totality of the opening statement. *See* Majority, ¶5. Beal's postconviction motion asserts that prior to the opening statement, Beal's counsel did not want Beal to testify because Beal "'insisted on testifying about irrelevant and odd details.'" *See* Majority, ¶16; *see also* ***State v. Krancki***, 2014 WI App 80, ¶¶8-10, 355 Wis. 2d 503, 851 N.W.2d 824. This postconviction assertion could not have been true unless Beal told his defense counsel that he intended to testify. Thus, at the time of defense counsel's opening representation to the jury, counsel had a reasonable factual basis for concluding that Beal likely would insist on testifying. After Beal chose not to testify, defense counsel explained to the jury in his closing argument why Beal did not testify. Defense counsel did what could be done to minimize any harm to the defense which the unfulfilled representation might have caused.

¶19 For these reasons, I agree that Beal's defense attorney did not provide ineffective assistance.