COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2299-CR **Cir. Ct. No. 2011CM199**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK D. ROSETI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Frank D. Roseti appeals an order of the circuit court denying, without a hearing, his postconviction motion claiming he is entitled

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to a new trial because his trial counsel was ineffective during his trial on two misdemeanor counts and in the interest of justice. For the following reasons, we affirm.

Background

¶2 Roseti was arrested and charged with misdemeanor counts of disorderly conduct and criminal damage to property based on an incident at a Two Rivers bar. A jury convicted him of both counts and Roseti filed a postconviction motion asserting that he was entitled to a new trial based on ineffective assistance of counsel and in the interest of justice. The circuit court[2] denied the motion without a hearing and Roseti appeals. Additional facts are set forth below.

Discussion

¶3 The question of whether a postconviction motion alleges sufficient facts entitling a defendant to a hearing involves a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "[W]hether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief" is a question of law we review de novo. ***Id.*** If the motion does raise such facts, the circuit court must hold a hearing. ***Id.*** 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 circuit court has the discretion to grant or deny a hearing." ***Id.*** On appeal, our review of a court's discretionary grant or

[2] The Honorable Fred H. Hazlewood presided over Roseti's jury trial. The Honorable Jerome L. Fox presided over the proceedings related to Roseti's postconviction motion.

denial of a hearing is "under the deferential erroneous exercise of discretion standard." ***Id.***

¶4 To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To establish prejudice, the defendant must "show the performance was prejudicial, which is defined as 'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" ***Allen***, 274 Wis. 2d 568, ¶26 (citation omitted). "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" ***State v. Domke***, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364 (quoting ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695). If the defendant fails to prove one prong, we need not address the other. *See* ***Strickland***, 466 U.S. at 697. Where a defendant's contention, like Roseti's here, is that the circuit court erred in denying a postconviction motion without a hearing, we review "only the allegations contained in the four corners" of the motion. ***Allen***, 274 Wis. 2d 568, ¶27.

¶5 In his postconviction motion, Roseti states that "[d]uring cross examination of [a named police officer], Mr. Roseti's trial counsel discovered he had not received one of two police reports authored by" the officer. Roseti claims he was provided ineffective assistance of counsel because "trial counsel failed to remedy the testimony of [the police officer] that was based upon the undisclosed police report."

¶6 Regarding his claim that trial counsel performed deficiently, Roseti's motion states:

> Trial counsel filed a written discovery demand on May 23, 2011. Pursuant to [WIS. STAT. §§] 973.23 and 971.31, the State has a duty to turn over the police reports relating to the defendant's statements. Trial counsel did not learn of the 4/15/11 police report until the cross-examination portion of [the officer's] testimony. By that point [the officer] had already testified to the substance of the report, including that Mr. Roseti indicated he "didn't remember" the incident in question. Trial counsel did not object, move for a mistrial, move to strike any portion of [the officer's] testimony, or take any other action to remedy the discovery violation.

¶7 Related to the prejudice prong, the motion states:

> The defense called one rebuttal witness in a private investigator and only one substantive witness in Mr. Roseti. Mr. Roseti testified in considerable detail [about] what happened at the bar the night of the incident, adamantly denying he was the one to throw the beer bottle at the mirror. The State called [the officer] to rebut Mr. Roseti's testimony. [The officer] testified "I asked him for his side of the story … giving him an opportunity to clarify what happened, at which time he stated he didn't remember." (Transcript p.120 10-14). [The officer's] testimony concerning Mr. Roseti's statements clearly contradicted Mr. Roseti's testimony on the stand. The nature of the defense was Mr. Roseti's credibility. There were no other witnesses whose testimony duplicated [the officer's] contention that Mr. Roseti could not remember what happened during the incident. [The officer's] credibility was not called into question. The only reasonable conclusion a jury could draw is that Mr. Roseti was not telling the truth on the stand. The end of the prosecutor's closing argument was exactly this point.

¶8 In its written decision denying the motion without a hearing, the circuit court noted that

> Roseti has not seen fit to include the [police report at issue] as an exhibit to the motion so the court is unable to determine what, if anything, it might have contained that would have distinguished it from [a police report written by

> the same officer on April 14, 2011, the day before the writing of the report at issue] which was attached to and made part of the original complaint."[3]

The court also addressed some of the trial testimony in the case and concluded "under the totality of the circumstances of this case," trial counsel's "failure to object to an apparent police report that he should have had but did not does not … equate to deficient performance."

¶9 We affirm the circuit court, but on the ground that Roseti's motion failed to adequately allege he was prejudiced by his trial counsel's alleged errors. *See* ***State v. Trecroci***, 2001 WI App 126, ¶45, 246 Wis. 2d 261, 630 N.W.2d 555 (we may affirm on other grounds). In his postconviction motion, Roseti complains trial counsel performed deficiently by failing to "object, move for a mistrial, move to strike any portion of [the officer's] testimony, or take any other action to remedy the discovery violation." However, in both his motion and appellate briefs, Roseti develops no arguments as to why any such objection or motion should or would have prevailed. Rather, without explanation, he appears to

[3] After the circuit court denied Roseti's postconviction motion, Roseti moved this court to supplement the appellate record with the April 15, 2011 police report. As we noted in our denial of his motion to supplement the record, "[i]t is well established that reviewing courts are limited to the record before the circuit court. Matters which were not presented to the circuit court and made part of the record before that court should not be presented to this court." (Citation omitted.)

conclude that the circuit court would have ruled in his favor if trial counsel had made such an objection or motion.[4]

¶10 Roseti fails to state in his postconviction motion that there was a reasonable probability the outcome of his case would have been any different if trial counsel had objected, moved for a mistrial, or moved to strike. At best, we would have to assume Roseti meant to imply there was a reasonable probability of a different outcome simply based on his reference to the prejudice prong requirement in his motion. We further must assume he is suggesting there was a reasonable probability a different outcome would have resulted when he states in his motion "[t]he nature of the defense was Mr. Roseti's credibility." However, other than indicating generally that Roseti's credibility was undermined by the officer's testimony, Roseti's motion fails to provide any reason to believe there was a reasonable probability there actually would have been a different outcome in his case even if trial counsel had prevailed with an objection or motion to strike.[5]

¶11 "A showing of prejudice requires more than speculation." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993); *see also* ***Domke***,

[4] In conclusory fashion, Roseti asserts in his postconviction motion and asserts in his brief-in-chief on appeal that the State's apparent failure to turn over the police report in question constituted a "discovery violation." Even if the failure to turn over the report did constitute a discovery violation, which the State contests, Roseti fails in his motion and on appeal to explain why there would have been a reasonable probability he would have prevailed with an objection or motion, there was a reasonable probability the court would have ordered a remedy beneficial to him, and/or how there is a reasonable probability any such remedy would have resulted in a different outcome in his case. Roseti also fails to identify what portions of the officer's testimony trial counsel should have moved to strike.

[5] We acknowledge that if the circuit court had granted a motion for mistrial, the outcome would have been different *for this trial*; however, Roseti provides no reason to believe a grant of a motion for mistrial would end the case. He does not suggest why the State would not try the case again or why he would not be convicted if the case was tried again.

337 Wis. 2d 268, ¶54 ("It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" (citations omitted)). Roseti's postconviction motion offers no more than conclusions and speculation as to prejudice, and does not explain how, considering the totality of the circumstances and in the context of the entire case, he was deprived of a fair trial. *See* ***Domke***, 337 Wis. 2d 268, ¶54 (In determining whether a defendant was prejudiced by trial counsel's actions or failure to act, a court "examine[s] the totality of the circumstances to determine whether counsel's errors, in the context of the entire case, deprived the defendant [of] a fair trial."). Thus, the circuit court did not erroneously exercise its discretion when it denied Roseti's postconviction motion without a hearing.

¶12 Roseti also states in his motion and on appeal that he is entitled to a new trial "in the interest of justice." Because this issue is inadequately developed both in his motion and on appeal, we do not address it. S*ee* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (the court of appeals need not address the merits of inadequately briefed issues).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.