OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

July 7, 2015

To:

Hon. David L. Borowski
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Mark S. Rosen
Rosen and Holzman
400 W. Moreland Blvd. Ste. C
Waukesha, WI 53188

Sandra L. Tarver
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2014AP1920-CR State of Wisconsin v. Jimi K. Wellman (L.C. #2012CF1941)

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

Jimi K. Wellman appeals from a judgment of conviction on one count of second-degree sexual assault and one count of incest. He also appeals from an order denying his postconviction motion for a new trial. Wellman claims that his trial attorney improperly counseled him, thereby depriving him of the right to testify, and that the trial court erred in denying his request for a new attorney a month before trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2013-14).[1] We conclude the circuit court erred by denying a hearing on Wellman's postconviction motion, so we summarily reverse the order denying the postconviction motion and remand with directions to hold a ***Machner***[2] hearing.

Wellman was charged with one count of second-degree sexual assault of a child under sixteen and one count of incest for allegedly having sexual intercourse with his fourteen-year-old cousin. The cousin was at Wellman's home, and they were seated on his bed, in his bedroom, playing video games. They both fell asleep on the bed. When the cousin woke up, her pants and underwear were around her knees and her vaginal area was wet. Wellman's DNA, extracted from sperm, was found on her underwear and on her vaginal and cervical swabs. At trial, a nurse testified that penetration was necessary for there to be sperm on the cervix. Wellman denied any sexual contact with his cousin. He said he was asleep all night and awoke with his pants and underwear on and a wet stain on both. He said he thought he might have had a wet dream.

At a final pre-trial, Wellman told the trial court that he wanted to raise an affirmative defense of sexsomnia.[3] The trial court ruled he could not present such a defense because it was not recognized in Wisconsin and because there was no foundation for it. Wellman also asked for a new attorney because he did not appreciate some of the things trial counsel allegedly said to him. The trial court rejected this motion in part because of the proximity to the trial date and in part because it did not believe Wellman's account of counsel's behavior.

---

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] Sexsomnia is "a disorder similar to sleepwalking." *See* ***New Mexico v. Colter***, No. 31,108, mem. op. (N.M. Ct. App. Aug. 15, 2011) (non-precedential).

According to Wellman's postconviction motion, after the trial court excluded the sexsomnia defense, trial counsel told Wellman that he could not give any testimony regarding whether he was sleeping at the time of the alleged assault. Thus, Wellman was constrained to agree to waive his right to testify. The jury convicted him on both counts, and the trial court sentenced Wellman to a total sentence of fourteen years' initial confinement and six years' extended supervision.

Wellman filed a postconviction motion seeking a new trial. He alleged that trial counsel deprived him of his right to testify "and was prejudicially ineffective with respect to trial matters." Wellman asserts that trial counsel told him that "not only could he not testify about sexsomnia, but he could not testify about having any sleep sexual contact whatsoever." This exclusion thus prevented Wellman from giving relevant testimony "as to the element of intent" and "about the facts and the events that had allegedly occurred." Specifically, Wellman wanted to testify that he had taken muscle relaxants before bed, that he slept the entire night, and that he has no memory of what happened because he was asleep. Because the victim slept through the assault and had no memory of events herself, Wellman believed his testimony had the potential to yield a different result because, he asserts, any sexual intercourse "must be conscious and affirmative before an inference can be drawn that there was an intent for sexual gratification or arousal."

The circuit court ordered briefing but ultimately denied the motion without a hearing. It explained that while Wellman claimed his testimony would be a defense going to intent, "[i]ntent was not an element of either offense." Further, while trial counsel was "arguably deficient" for telling Wellman "that he could not testify to *any* facts about sleeping," the circuit court concluded there was no prejudice because there was no "reasonable probability or even a

reasonable possibility that the jury would have acquitted based upon 'I don't remember' testimony" in light of the DNA evidence.

When a defendant claims that his right to testify was violated by defense counsel, the proper framework for evaluating the claim is through the ineffective-assistance-of-counsel framework established in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Flynn***, 190 Wis. 2d 31, 50, 527 N.W.2d 343 (Ct. App. 1994). A ***Machner*** hearing is a prerequisite to a finding of ineffective assistance. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998).

Thus, the present issue is whether Wellman's motion was sufficient on its face to entitle him to an evidentiary hearing. If the motion raises sufficient material facts that, if true, show the defendant is entitled to relief, then the circuit court must hold a hearing on the motion. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. Sufficiency of the motion is a question of law we review *de novo*. *See* ***id.***

Counsel will be deemed ineffective if the defendant shows that counsel performed deficiently and that the deficient performance prejudiced the defense.[4] *See* ***State v. Domke***, 2011 WI 95, ¶34, 337 Wis. 2d 268, 805 N.W.2d 364. "To establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of

[4] Contrary to Wellman's argument on appeal, a deprivation of the defendant's right to testify is not so serious an error that prejudice will be presumed. *See* ***State v. Nelson***, 2014 WI 70, ¶35, 355 Wis. 2d 722, 849 N.W.2d 317 ("That a defendant must show that the denial of his or her right to testify was prejudicial … is not a new concept.").

'reasonably effective assistance.'" ***Id.***, ¶36 (citation omitted). To demonstrate prejudice, the "'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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *See* ***id.***, ¶54 (citation omitted). Stated another way, "'the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *See* ***id.*** (citation omitted). "Whether counsel was ineffective is a mixed question of fact and law." ***Balliette***, 336 Wis. 2d 358, ¶19.

Here, we conclude that the postconviction motion alleges sufficient facts to warrant a hearing. Wellman does not challenge the trial court's exclusion of the "sexsomnia" defense. Thus, he could not have testified that he believed he had a disorder that caused him to unknowingly or involuntarily engage in sexual intercourse while he slept. However, the exclusion of sexsomnia-related testimony should not have prohibited the testimony that Wellman's postconviction motion alleges he hoped to give: that he had taken muscle relaxants before bed, that he slept all night, and that he did not remember anything that happened because he was asleep all night. If trial counsel did, in fact, tell Wellman that all sleep-related testimony was excluded, then counsel was deficient in his advice. What counsel actually told Wellman, however, is a question of fact that is presently undetermined.

If a postconviction motion does not raise sufficient material facts or presents only conclusory allegations, or if the record conclusively shows the defendant is not entitled to relief, then whether to hold a hearing is a discretionary matter. *See* ***id.***, ¶18. Here, the circuit court denied the postconviction motion without a hearing because it concluded that no reasonable jury would acquit based on Wellman's prospective testimony. We are constrained to disagree.

The circuit court was correct to note that intent is not an element of either second-degree sexual assault or incest, to the extent that each charge is premised on sexual intercourse.[5] *See* ***State v. Neumann***, 179 Wis. 2d 687, 707-08, 508 N.W.2d 54 (Ct. App. 1993). However, "in order for sexual intercourse, as defined [by WIS. STAT. § 948.01(6)] to occur, the defendant has to … affirmatively perform one of the actions [listed in the definition] on the victim[.]" *See* ***State v. Olson***, 2000 WI App 158, ¶10, 238 Wis. 2d 74, 616 N.W.2d 144. We cannot say that Wellman's proposed testimony that he took muscle relaxants and slept all night is so inherently unbelievable that he could be found incredible as a matter of law, such that the record conclusively demonstrates he is not entitled to relief.

Based on the motion, if Wellman testified and a jury believed that he was asleep and, thus, unconscious all night, the jury could reasonably infer that he had not taken any affirmative action to engage his cousin in sexual intercourse, particularly given that she had no recollection of the assault, either. The likely result of such an inference would be a not-guilty verdict. Thus, Wellman's postconviction motion adequately alleged the potential prejudice that resulted if trial counsel deficiently advised him and erroneously caused Wellman to waive the right to testify.

[5] Wellman argues on appeal that sexual intercourse "must be conscious and affirmative" before a jury can infer "an intent for sexual gratification or arousal." However, such intent is necessary when an assault is alleged to have occurred by sexual contact. *See* WIS. STAT. § 948.01(5)(a) (defining sexual contact as "*intentional* touching … for the purpose of … sexually arousing or gratifying the defendant") (emphasis added). Wellman's alleged assault was by sexual intercourse, and "the statute indicates that no intent need be proven for the offense of sexual assault by sexual intercourse." *See* ***State v. Neumann***, 179 Wis. 2d 687, 707-08, 508 N.W.2d 54 (Ct. App. 1993) (relying on WIS. STAT. § 940.225(5)(c) for definition of sexual intercourse); *see also* WIS. STAT. § 948.01(6) (substantively identical definition of sexual intercourse as § 940.225).

Accordingly, we conclude Wellman was entitled to a ***Machner*** hearing on his postconviction motion.[6] We therefore reverse the order denying the motion and we remand this matter with directions for the circuit court to conduct such a hearing.

Upon the foregoing, therefore,

IT IS ORDERED that the order denying the postconviction motion is summarily reversed and the cause remanded with directions to conduct a ***Machner*** hearing on the motion.

Diane M. Fremgen
Clerk of Court of Appeals

[6] We do not presently reach Wellman's other issue raised in his postconviction motion, whether the circuit court erred in denying his request for a new attorney, because if Wellman prevails on remand and a new trial is ordered, the issue regarding the request for substitute counsel will likely be moot. However, if the circuit court again denies relief on the ineffective-assistance claim, it may reinstate its prior holding on the new attorney request either expressly or by reference to the prior order.