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September 8, 2015

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

2014AP1488-CR State of Wisconsin v. Dennis V. Hahn (L.C. # 2009CF193)

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

Dennis Hahn appeals a judgment of conviction and an order denying his postconviction motion for a new 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 summarily affirm.

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

Hahn was convicted, after a jury trial, of disorderly conduct, misdemeanor battery, false imprisonment, three counts of second-degree sexual assault, strangulation and suffocation, and felony intimidation of a victim, all as acts of domestic abuse. Hahn argues on appeal that the circuit court erred when it denied his suppression motion and that his trial counsel was ineffective in a number of ways. We will address each of his arguments in turn.

Hahn argues that statements he made while in police custody should be suppressed because the detective who provided the ***Miranda***[2] warnings slurred his words so as to prevent proper communication and understanding of those rights, because the record is insufficient to establish a knowing, voluntary, and intelligent waiver of those rights, and because Hahn invoked his right to counsel when he said to the detective, "I should probably have a lawyer, huh." As the State points out in its brief, we need address only the last argument because the first two were not preserved for appellate review.

A failure to raise a specific challenge in the circuit court forfeits the right to raise that challenge on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826-29, 539 N.W.2d 897 (Ct. App. 1995). The sole basis for suppression stated in Hahn's motion filed in the circuit court was an allegation that he invoked his right to counsel after he was advised of his rights. Prior to the suppression hearing, Hahn's counsel confirmed on the record that the only issue to be decided by the court was whether Hahn had invoked his right to counsel. Thus, Hahn forfeited any challenges to his statements on other grounds. While forfeited claims may be addressed in the context of an ineffective assistance of counsel claim, *see* ***State v. Carprue***, 2004 WI 111, ¶47,

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

274 Wis. 2d 656, 683 N.W.2d 31, Hahn's postconviction motion did not allege that his defense counsel was ineffective for failing to raise either of the first two arguments regarding his statements that he now raises on appeal. Rather, his postconviction motion argued that defense counsel was ineffective for not challenging the voluntariness of his statements based on a recent accident and head injury.

We turn, then, to the only ***Miranda*** issue preserved for review, which is whether Hahn unambiguously asserted his right to counsel. In order to invoke the right to counsel, a "'suspect must unambiguously request counsel.'" ***State v. Markwardt***, 2007 WI App 242, ¶27, 306 Wis. 2d 420, 742 N.W.2d 546. If the suspect merely "'makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer, in light of the circumstances, would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.'" ***Id.*** (quoted source omitted).

In this case, Hahn said, "I should probably have a lawyer, huh." The detective responded, "Up to you man, up to you." Hahn then began to spontaneously discuss the case and what the victim might have been thinking. Hahn's statement about having a lawyer is similar to statements in other cases that have been held to be ambiguous and equivocal. For example, in ***Davis v. United States***, 512 U.S. 452, 455 (1994), the United States Supreme Court held that the defendant's statement, "[m]aybe I should talk to a lawyer," was not an unambiguous request for counsel. Similarly, in ***State v. Jennings***, 2002 WI 44, ¶36, 252 Wis. 2d 228, 647 N.W.2d 142, our state supreme court held that the defendant did not unambiguously and unequivocally invoke his right to counsel when he stated, "I think maybe I need to talk to a lawyer." We conclude that, like the statements in ***Davis*** and ***Jennings***, Hahn's statement was not an unambiguous and unequivocal request for counsel.

We turn next to Hahn's ineffective assistance of counsel arguments. A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. Applying this test to each of Hahn's arguments about his trial counsel's shortcomings, we are satisfied that he did not receive ineffective assistance.

First, Hahn argues that his trial counsel was ineffective for failing to impeach the victim with inconsistent testimony from the preliminary hearing. The victim testified at the preliminary hearing that she was letting the dog out of his kennel and that, when she stood up from unlatching the kennel, Hahn grabbed her around the neck and put a hand over her nose and mouth. At trial, the victim testified that she did not get the last kennel latch undone before Hahn grabbed her.

Even if we assume, without deciding the issue, that defense counsel was deficient for failing to impeach the victim about letting the dog out, we are satisfied that Hahn was not prejudiced. Hahn argues that the inconsistencies in the testimony undermined the victim's credibility. However, both Hahn and the victim testified extensively about their relationship and the events that led to Hahn's charges. A single inconsistency in the victim's testimony, regarding whether the kennel was latched or unlatched, does not undermine our confidence in the jury's verdicts. *See* ***id.***, ¶58 (to prove prejudice, the defendant must show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented).

Hahn also argues that his counsel's failure to impeach the victim about letting the dog out prejudiced him specifically as to the false imprisonment count. He argues that evidence that the victim opened the kennel would have provided a benign explanation for why Hahn locked the

bedroom door—to keep the dog out. However, as the State points out in its brief, that explanation does not exclude a less benign inference that Hahn locked the door both to keep the dog out and to keep the victim in. Additionally, there was other evidence that Hahn intentionally confined the victim in the bedroom. For example, there was evidence that the victim protested that she did not want to be in there, that Hahn tried to handcuff her arms behind her back, and that Hahn pushed her onto the bed and told her no one was going to hear her and that, if she kept screaming, he would kill her. In light of the other evidence, we are satisfied that Hahn's counsel's failure to impeach the victim about letting the dog out did not result in prejudice to Hahn.

Next, Hahn argues that his trial counsel was ineffective for failing to impeach the interviewing detective's testimony that he did not warn the victim that her interview was being recorded after showing the jury a video proving that testimony to be untrue. However, defense counsel did draw attention to this inconsistency during closing argument. Counsel referred to the video, stating, "'Detective Karski comes to the doorway and says, 'You know this room is being recorded.'" This statement, when combined with the fact that the jury saw the video showing the detective's warning, effectively impeached the detective's testimony that he did not give such a warning. Thus, we are satisfied that counsel's performance was not deficient with respect to this issue.

Hahn also argues that his trial counsel was ineffective for failing to seek out expert testimony regarding Hahn's shoulder injury and what effect that injury would have had on his ability to carry out the attack on the victim. We agree with the State that Hahn's counsel was not

deficient for failing to seek out such expert testimony because it would not have been relevant. Hahn's trial counsel testified at the ***Machner***[3] hearing that he reviewed Hahn's medical records prior to trial and that the records showed that his shoulder issue had resolved nearly a year before the incident.

Next, Hahn argues that he received ineffective assistance of counsel when his attorney failed to move for a mistrial because of a sleeping juror. Even if we assume, without deciding the issue, that Hahn's trial counsel was deficient in that regard, we conclude that Hahn was not prejudiced because, as Hahn concedes in his brief, the juror was ultimately removed as an alternate and did not participate in deliberations. Hahn's arguments regarding other jurors being distracted amount to nothing other than speculation and, therefore, do not undermine our confidence in the convictions.

Finally, Hahn asserts that his trial counsel rendered ineffective assistance when he failed to subpoena witnesses to testify about the "unconventional nature" of the sexual practices of Hahn and the victim. The record reflects that Hahn's first attorney, Thomas Johnson, filed a motion in limine requesting that the court admit evidence, in the form of testimony from third party witnesses, about the victim's prior sexual conduct with Hahn. At a hearing on the motion, Johnson informed the court that, after a discussion with two witnesses about what they could testify to firsthand as opposed to what they had merely heard from others, Johnson decided that the testimony would "not be helpful" and he released the witnesses from their subpoenas. Hahn

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

confirmed for the court on the record that he concurred with Johnson's opinion that those witnesses would not be necessary and that he agreed with Johnson's strategy on the matter.

We are satisfied, based on the record, that the decision not to subpoena any witnesses about Hahn's and the victim's asserted unconventional sexual practices was a reasonable strategic decision and that Hahn agreed with the decision. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted). Accordingly, we reject Hahn's argument that his counsel was ineffective for failing to subpoena witnesses regarding the sexual practices of Hahn and the victim.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals