COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3612

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS J. O.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Thomas J. O. appeals from an order denying his motion for postconviction relief. Thomas pled no contest to third-degree sexual assault and false imprisonment for sexually assaulting his wife. He now seeks to withdraw his plea alleging that the plea was involuntary and that he received

ineffective assistance of counsel. Because we conclude that the plea was not coerced and counsel was not ineffective, we affirm.

¶2 In 1993, Thomas was charged with two counts of second-degree sexual assault. The charges were brought as a result of a statement his wife, M.O., made to the police the day after the second incident took place.

¶3 At the preliminary hearing, the first witness the State called was M.O. Her testimony on the first day of the preliminary hearing differed substantially from the statement she had given to the police. When it became clear that her testimony was substantially different from the previous testimony, the State attempted to treat her as a hostile witness. The court stated that if the State was going to impeach her with her prior testimony, she needed to be advised of her right to an attorney. The court stated to her:

> What I am going to do is advise you of some things based upon what you have heard so far today. It's possible, if the District Attorney believes that you have given false information either on the witness stand or when you gave information to the police about what might have occurred on these previous incidences, if you lied on the witness stand, that's called perjury; and it is a felony for which you could be placed in prison. If you lied to the police, that's called obstructing or could be called obstructing; and the District Attorney could charge you for giving false information to the police.
>
> I think, based upon the sensitive nature of the charges alleged against Mr. [O.] and the position that you are in, that you have a right to have counsel assist you in this matter, especially given the fact that the District Attorney is making a request that I allow him to treat you as a hostile witness.

¶4 Two more days of testimony were taken. On the second day of the hearing, M.O. again changed her story. Eventually, after advice from her own counsel, she refused to answer the district attorney's questions on the grounds that

it might incriminate her. She then, however, answered questions from the defense attorney. After she finished testifying, her counsel asked the court to be allowed to withdraw because he was faced with an "ethical dilemma." The court refused.

¶5 By the third day of the hearing, M.O., represented by another attorney, refused to testify at all. Testimony was taken from other witnesses. Thomas was bound over for trial. After this, Thomas and the State conducted plea negotiations. As a result of these negotiations, Thomas pled no contest to one count of third-degree sexual assault and to false imprisonment. As a result of these negotiations, his potential sentence exposure was reduced from forty to seven years. In addition, the State agreed to recommend probation and agreed not to prosecute M.O. Thomas was sentenced to a total of five years, which sentence was stayed and Thomas was placed on probation for four years.

¶6 Thomas now seeks to withdraw his plea on the grounds that it was coerced and that he received ineffective assistance of counsel because his attorney counseled him to accept the plea agreement. He alleges that the plea was coerced because the State had threatened to prosecute his wife for perjury and/or obstruction of justice if he did not accept the plea. The trial court denied his motion for postconviction relief, finding that during the plea colloquy Thomas had stated that he was not being coerced.

¶7 Thomas has not provided this court with a copy of the transcript of his plea hearing. In the absence of the transcript, we must assume that the missing material supports the trial court's ruling. "Appellate review is limited to the record before the appellate court, and we will assume in the absence of a transcript that every fact essential to sustain the trial judge's exercise of discretion is

supported by the record." ***Dunhame v. Dunhame***, 154 Wis.2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989).

¶8 Further, the record does not support Thomas's claim that his plea was coerced. Thomas states that the State threatened M.O. with prosecution. As discussed above, however, the record establishes that it was the court which first suggested to M.O. that she might be faced with a charge of perjury or obstruction of justice given the variations in the different versions of her descriptions of the incidents.

¶9 Moreover, the threat, if there was one, was not unfounded. M.O.'s testimony at the hearing differed from day to day and from the story she had initially given to the police. Whether her recantation was true or false, by giving such widely differing versions of the events, she could have been charged with either obstructing justice or perjury. Based on this record, we cannot conclude that Thomas's plea was coerced.

¶10 Thomas also contends that he has newly discovered evidence in the form of evidence of M.O.'s prior false allegation against a boyfriend. Thomas, however, never argued to the trial court that the alleged prior allegation constituted newly discovered evidence. Because he did not raise the argument before the trial court, he cannot now argue it on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980) (no issue or claimed error of the trial court may be reviewed on appeal unless it was raised first before the trial court).

¶11 Thomas next contends that his trial counsel was ineffective for failing to investigate the prior false allegations and for allowing him to accept the plea negotiations in light of the threats he alleges were made to prosecute M.O. To establish an ineffective assistance of counsel claim, a defendant must show

both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient, the claim fails and this court need not examine the prejudice prong. *See* ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

¶12 First, Thomas has failed to establish that he, in fact, has evidence of a prior false accusation. There is simply nothing in the record which supports this statement.[1] In the absence of any evidence to support his assertion that there was something to investigate, we cannot conclude that counsel was ineffective for failing to investigate.

¶13 Thomas also contends that his counsel was ineffective for allowing him to accept the plea when the plea was coerced. However, as discussed above, based on the record before us, we conclude that the plea was not coerced. Because there was no defect in the plea proceeding, counsel was not ineffective for allowing Thomas to accept the plea.

¶14 Finally, Thomas asks us to exercise our discretion to reverse his conviction in the interest of justice. This we decline to do. The order denying Thomas's motion for postconviction relief is affirmed.

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[1] Thomas has included in his brief a letter which he asserts supports his contention. We will not consider it, however, because it was not part of the record before the trial court. *See* ***State v. Aderhold***, 91 Wis.2d 306, 314, 284 N.W.2d 108, 112 (Ct. App. 1979).

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.