COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP918 **Cir. Ct. No. 2009CF1071**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL P. BENSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Appellant Darryl P. Benson appeals an order denying his postconviction motion. He argues: (1) he received ineffective assistance of appellate counsel because his lawyer did not argue that the circuit court erred when it answered a question from the jury; (2) he received ineffective

assistance of appellate counsel because his lawyer did not argue that his trial counsel ineffectively represented him; (3) he received ineffective assistance of trial counsel because his trial lawyer did not object to the circuit court's response to the jury question; and (4) the circuit court should not have denied his postconviction motion without an evidentiary hearing. We affirm.

¶2 Benson was charged with four counts of first-degree sexual assault of a child, and convicted of three counts after a jury trial. During his direct appeal, Benson argued that his trial attorney ineffectively represented him by failing to challenge the charges against him as duplicitous and by failing to investigate and impeach certain state witnesses. We rejected Benson's arguments and affirmed the judgment of conviction. Benson then filed this collateral postconviction motion. The circuit court denied the motion without a hearing.

¶3 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show 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.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

¶4 Although couched as ineffective-assistance-of-counsel claims, the crux of Benson's argument is that the circuit court erred when it answered a

question from the jury about the dates counts three and four were alleged to have occurred. During deliberations, the jury sent a written question to the judge:

> We need clarification
> of counts 3 + 4
> As to: Count 3
> occurred on 2/27/09?
> And if Count 4 occurred when? [W]as [there] any known
> date?

(Formatting from the original note.) After consulting with both the prosecutor and defense counsel, who agreed with the circuit court's proposed response, the circuit court informed the jury: "Ladies and Gentlemen, Counts three and four are alleged to have occurred between February 12, 2009, but before February 28, 2009."

¶5 Benson contends that the circuit court's response was *factually incorrect* because it was inconsistent with the amended information. He points to the first amended information, which alleged that count four occurred "after February 12," and argues that the trial court improperly substituted the word "between" for the word "after" when it responded to the jury's question.

¶6 Benson's argument misses the mark. He overlooks the fact that the information was amended twice. The first amended information alleged that count four occurred "after February 12, but before March 2, 2009." The circuit court amended the information a second time on the first day of trial after dialogue with the prosecutor and defense counsel about the date of the fourth offense because Benson was arrested on February 28, and therefore could not have committed the fourth offense on March 1 or March 2. The second amended information alleged that count four occurred "between February 12, 2009, but before February 28, 2009." That is the exact language that the circuit court used to respond to the

jury's question. We reject Benson's argument that the circuit court's response to the jury was factually incorrect.[1]

¶7 Benson also argues that the circuit court's response to the jury required him to defend against two charges "with the same nexus date of February 12, 2009," thus violating his right to be free from double jeopardy. This argument is a variation of an argument Benson made on direct appeal when he challenged the charges against him as duplicitous. We rejected the argument, concluding that "each count was distinguishable from the others by date, location, or act charged." ***State v. Benson***, No. 2010AP2455-CR, unpublished slip op. ¶19 (WI App May 8, 2012). Benson may not raise this double jeopardy argument again because "[a] matter once litigated may not be relitigated in a subsequent proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶8 Moreover, as we previously explained in our decision on direct appeal, count one and count four are not the same. Count one alleged that Benson had sexual contact with S.W. at her home on February 12, 2009. Count four alleged that Benson had sexual contact with S.W. at her home "between February 12, 2009, but before February 28, 2009." The prosecutor clarified for the jury in closing argument that "between February 12, 2009, and February 28, 2009," meant that the offense occurred "not on February 12, [but] between the

[1] It is unclear from the record why the word "between" was substituted for the word "after" in the second amended information. During an exchange about the proposed amendment, the prosecutor explains, "It states … between February 12th and … March 2nd. When I read that, to me 'between' means you start on February 13th and end on March 1st."

period of time after February 12 and before February 28 when [Benson] was arrested."

¶9 The other issues that Benson raises are all premised on his argument that the circuit court erred in answering the jury question. Because we conclude that the circuit court did not err, we do not address Benson's other claims.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).