COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2672 **Cir. Ct. No. 2009CF2728**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY D. WRIGHT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 CURLEY, P.J. Larry D. Wright, acting *pro se*, appeals the order denying his postconviction motion without an evidentiary hearing brought

pursuant to WIS. STAT. § 974.06 (2013-14).[1] In 2010, Wright was convicted by a jury of two counts of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2009-10), and one count of child enticement, contrary to WIS. STAT. § 948.07(7) (2009-10). In this appeal, Wright contends that: (1) his postconviction counsel gave him ineffective assistance because he did not raise the claim of ineffective assistance of trial counsel in his direct appeal; (2) the trial court should have held a hearing on what he interprets as an unlawful *ex parte* communication with the jury outside his and his attorney's presence that violated his right to be present at trial; and (3) the cumulative effect of these alleged errors was prejudicial. We conclude that his trial attorney was not ineffective. There was no prohibited *ex parte* communication with the jury and his right to be present was not implicated. Finally, since there were no errors, there was no prejudice.

¶2 Further, because the issues Wright raises are not clearly stronger than those argued by his postconviction attorney, and the issues he presents, on their face, are insufficient to warrant relief, Wright was not entitled to an evidentiary hearing. We affirm.

BACKGROUND

¶3 On June 4, 2009, Wright was charged with three counts of second-degree sexual assault of a child. The victim, S.F., was fourteen years of age. She told the police that she knew Wright because he was a part-owner of a Metro Quick Mart where she sometimes went. She claimed that on May 15, 2009, Wright picked her up at her home and drove her to the store. Wright then took her

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

into the basement where he removed her clothing and had sexual intercourse with her. She also related that several days later, on May 18, 2009, Wright picked her up and they went to a motel on South 27th Street where they engaged in two acts of sexual intercourse. Wright was not arrested until late September 2009. During this time period, he contacted S.F. and paid her to write two letters recanting her accusations. Several weeks before the jury trial was to begin, the State filed an amended information adding two counts of child enticement. Although Wright objected, the trial court permitted the amended information to be filed.

¶4 Wright's jury trial commenced on July 19, 2010. At the trial, numerous witnesses were called by both sides. S.F. admitted writing two letters recanting her earlier accusations. She explained that even though the sexual assaults actually occurred, she wrote the letters because she needed the money that Wright gave her for writing them. One of the police officers who testified, Detective Lucretia Thomas, found the motel with the aid of S.F. where S.F. said Wright took her and sexually assaulted her. She interviewed the female motel owner, who produced registration cards that reflected that Wright had been at the motel both on May 17, 2009, and May 18, 2009. Detective Thomas also testified at Wright's revocation hearing. Wright contends there is a conflict between Detective Thomas's testimony at trial and at the revocation hearing. He also argues that Detective Thomas's written report, which states that the female motel owner who checked in Wright the second night (May 18) thought a thin white girl brought in Wright's identification, conflicts with the female motel owner's testimony.

¶5 The jury convicted Wright of two counts of second-degree sexual assault and one count of child enticement. He was found not guilty of one count of second-degree sexual assault and one count of child enticement. Shortly before

the jury reached a verdict, the jury sent a note seeking an exhibit. It is unclear whether the exhibit was given to the jury. Following sentencing, with the aid of a lawyer, Wright brought a postconviction motion which was denied. This court affirmed his convictions on May 7, 2013. The issues raised in his direct appeal concerned the trial court's choice of jury instructions. His then-attorney filed a petition for review to the supreme court. The petition was denied. On September 10, 2014, he filed his *pro se* motion which is the subject of this appeal. The trial court denied Wright's motion without a hearing.

ANALYSIS

A. Wright has not proven that his postconviction counsel was ineffective.

¶6 Wright argues that he is entitled to a new trial because his postconviction attorney was ineffective for not raising the claim that his trial attorney was ineffective. He also asserts that the trial court erred by failing to conduct an evidentiary hearing. A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing on that claim. To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the defendant's motion must allege, with specificity, both that counsel provided deficient performance and that the deficiency was prejudicial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). "If the motion … alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." ***Id.*** at 310. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently. ***Id.*** However, if the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny

the motion without a hearing. ***Id.*** at 309-10. When reviewing a court's discretionary act, this court utilizes the deferential erroneous exercise of discretion standard. ***Id.*** at 311.

¶7 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well-known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

¶8 With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *See* ***id.*** at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. ***Id.*** Rather, 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." ***Id.*** at 694.

¶9 Additionally, when arguing that postconviction counsel was ineffective for failing to raise the ineffectiveness of trial counsel, a defendant must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought. *See* ***State v. Starks***, 2013 WI 69, ¶¶56-60, 349 Wis. 2d 274, 833 N.W.2d 146.

¶10 Wright argues that his postconviction counsel was ineffective because he failed to raise the ineffectiveness of trial counsel. Wright first faults his trial attorney for failing to investigate who checked him into the motel on May 18th where S.F. testified Wright took her. He believes his lawyer should have interviewed the co-owner of the motel. The wife, who with her husband owned the motel, testified at the trial, through a Serbian interpreter, that she filled out the registration card for May 18th. Her testimony contradicted a report of Detective Thomas. The police report stated that the woman thought a thin white girl brought in Wright's identification on May 18th. At trial, the woman testified she could not remember telling the detective that a white girl was with Wright. Instead, she testified that she thought a male brought in Wright's identification. Wright also stayed there on May 17th. Wright's contention is that he was with a white girl on May 18th when at the motel. He also suggests that his attorney should have hired a handwriting expert to examine the motel registration cards to see whether the male or female motel owner checked him into the motel on May 18th. Wright also criticizes his trial attorney's failure to obtain the detective's memo books, which, he submits, would clear up the calendar issue. He also contends that Detective Thomas's testimony at trial differs from her testimony at Wright's revocation hearing.

¶11 We are unpersuaded. First, we have no idea what the husband-owner would say, making Wright's argument speculative. The wife motel owner testified that she checked Wright in on May 18th. She disputed the police report that said a thin, white girl was with him, but her testimony was consistent with the police report that said she checked Wright in on May 18th. In fact, Wright concedes that the female motel owner checked him in on May 18th. Consequently, nothing would be gained by interviewing the male motel owner,

and thus, there is no need for a handwriting expert. S.F. said she waited in the car when Wright checked in, so the motel owner would not have seen her. As to the male who might have brought Wright's identification into the motel, the witness may have simply confused Wright with someone else. She did, however, identify his photo at the time of the police interview as someone she recognized but was not certain.

¶12 Second, since Wright's attorney filed a discovery demand, which would have covered Detective Thomas's memo book, and none was turned over, it is highly likely that no memo book exists. As noted, the police report states that the female motel owner told the detective that she checked Wright in on the night of the assault. This is consistent with the female motel owner's testimony at trial. Nothing helpful would be gained from trying to obtain the possibly nonexistent memo book. Further, the police report is ambiguous as to who checked in Wright on May 17th. It reads: "[Wife motel owner] said that she checked WRIGHT in on his second night there (05-18-09) and her husband had said to her that he was there the night before, as well." (Emphasis in original.) The inference is that the husband checked Wright in on May 17th, but it is not clear if he actually did, or if he simply remembered seeing him the night before. Any confusion concerning who checked him in on May 17th is outweighed by the fact he was at the motel on the night of the assault. Moreover, if, as is claimed, Detective Thomas confused which motel owner checked in Wright on May 17 and May 18 when testifying at the revocation hearing, Wright suffered no prejudice at his criminal trial.

¶13 Wright fails to acknowledge that the most damaging evidence in this scenario is the fact that a fourteen-year-old girl from a different side of town had the ability to point out the very motel, the name of which she did not know, where registration cards showed Wright stayed on May 18th, the day of the assault. How

could she pick out the motel where Wright stayed on the night of May 18th from all the other hotels nearby if she had not been there with him? Clearing up the police report and the identification of the handwriting on the registration cards would not have changed the verdict.

¶14 These anomalies in the trial do not affect the verdict. Much of Wright's argument concerning the alleged ineffective assistance of his two attorneys is speculative, conclusory, and insufficient. His arguments are not clearly stronger than those raised by his appellate attorney. Because Wright's trial attorney was not ineffective, his postconviction attorney was not ineffective for failing to raise this claim.[2]

B. There was no prohibited ex parte communication with the jury and Wright's right to be present was not violated.

¶15 Wright argues that he was not present when a bailiff took an exhibit to the jury. He submits the trial court should have held a hearing on his contention that the giving of an exhibit to the jury when he was absent was both a violation of the prohibition against *ex parte* communications with jurors and a violation of his right to be present at trial.[3] The term "*ex parte*" is defined as "[o]n or from one party only, usu[ally] without notice to or argument from the adverse party." *Ex parte*, BLACK'S LAW DICTIONARY (10th ed. 2014). In its application here,

[2] A letter in the file from Wright's postconviction attorney reflects his view that he was "ethically prohibited" from pursuing the ineffective assistance of his trial attorney because nothing in the record supported it.

[3] It should be noted that in his reply brief, Wright changes his argument to claim that his attorney was ineffective for not "adequately [preserving]" his claim with regard to *ex parte* communication. Arguments raised for the first time in a reply brief will not be considered. *See* ***Roy v. St. Luke's Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256.

Wright complains the bailiff should not have taken an exhibit to the jury without a discussion between both sides with Wright present.

¶16 With regard to what Wright has called an improper *ex parte* communication with the jury, it must be noted that whether or not the jury received the requested exhibit is unknown. At the motion hearing held after the trial, Wright's attorney told the trial court that an exhibit was given to the jury and he was not notified of it, even though the attorneys had reached an agreement that they would be called when the jury sent out a note asking for an exhibit. Wright's attorney's source for this information was Wright himself. However, Wright, in his brief, disavowed any knowledge of telling his attorney that a bailiff took an exhibit up to the jury room after the jury requested it. The assistant district attorney's stated position was that "[he] was under the impression that they didn't get the exhibit. They changed their minds and didn't want it, and they had a verdict." The trial court pointed out that there is a note requesting the exhibit in the file, but the trial court never clarified whether the jury actually received the exhibit. The trial court presumed the jury never received the exhibit.

¶17 WISCONSIN STAT. § 971.04 lays out when a defendant is to be present. Section 971.04(f) states a defendant must be present when the jury returns a verdict. The statute is silent as to whether the defendant must be present when the jury requests an exhibit. In any event, whether the jury was given the note or reached its decision without the exhibit is of no consequence here.

¶18 First, if the jury did receive the exhibit, the parties had stipulated earlier that the jury was entitled to request and receive any exhibit without any discussion or argument by counsel. Thus, no unlawful *ex parte* communication occurred if the jury obtained the exhibit. The only request made by the attorneys

was that a courtesy call be made to them alerting them as to what exhibit or exhibits were requested. Given the stipulation, Wright need not have been present when the jury requested an exhibit. At best, the only variance from the stipulation was that someone failed to call the attorneys. Moreover, even if we assume that Wright's absence at the time the jury requested an exhibit violated his statutory right to be present, it would be harmless error. *See generally* ***State v. David J.K.***, 190 Wis. 2d 726, 528 N.W.2d 434 (1994).

¶19 If, on the other hand, the jury reached a verdict without obtaining the requested exhibit, there is obviously no *ex parte* communication. The fact that no phone calls were made to either attorney, and there is no entry on the judgment roll that any exhibit went to the jury, suggests that the jury never received the exhibit. Consequently, there was no prohibited *ex parte* communication with the jury. Wright can hardly complain if the jury reached a verdict before obtaining the desired exhibit, nor can he complain that his right to be present was violated.

C. The underpinnings for an argument that the cumulative effect of Wright's trial attorney's ineffectiveness resulted in prejudice are not met here.

¶20 Effects of multiple incidents of deficient performance can be aggregated in determining the overall impact of deficiencies and the cumulative effect of counsel's deficient performance can result in prejudice. *See* ***State v. Thiel***, 2003 WI 111, ¶¶59-62, 264 Wis. 2d 571, 665 N.W.2d 305.

¶21 Because there was no error committed during the trial by counsel, Wright's argument that the cumulative effect of the ineffectiveness resulted in prejudice is unavailing.

¶22 Given the above discussion, the trial court properly denied Wright's motion without a hearing.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.