

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 22, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2005AP951-CR**

**Cir. Ct. No. 1995CF118**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSEPH ROBERT WILCOX,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Pierce County: DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Joseph Wilcox appeals a judgment convicting him of second-degree sexual assault of a child. Wilcox also appeals an order denying his motion for postconviction relief. Wilcox argues the circuit court erroneously exercised its discretion when it denied his ineffective assistance of counsel claim

without conducting an evidentiary hearing. We reject Wilcox's arguments and affirm the judgment and order.

### BACKGROUND

¶2 In December 1995, the State charged Wilcox with second-degree sexual assault of a child. After Wilcox was bound over for trial, Wilcox left Wisconsin and was eventually brought back before the court in June 2002. After a jury trial, Wilcox was convicted upon the jury's verdict of the crime charged. Because the offense occurred on October 19, 1995, the circuit court imposed an indeterminate six-year sentence. *See* WIS. STAT. § 973.01(1) (2003-04) (bifurcation of sentences under Truth in Sentencing applies only to felonies committed on or after December 31, 1999). Wilcox filed a postconviction motion for a new trial based on the ineffective assistance of trial counsel. The circuit court denied the motion without a hearing, and this appeal follows.

### DISCUSSION

¶3 Wilcox argues that the circuit court erroneously exercised its discretion when it denied his ineffective assistance of counsel claim without conducting an evidentiary hearing. We are not persuaded.

¶4 A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. To obtain an evidentiary hearing, the defendant's motion must allege, with specificity, both that counsel provided deficient performance and that the deficiency was prejudicial. *State v. Bentley*, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). If the motion alleges facts that 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.*

¶5 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 310-11.

¶6 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.

¶7 With respect to the prejudice component of the test, 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 this burden by merely showing that the error had some conceivable effect on the outcome. Rather, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

¶8 Here, Wilcox claims that "the trial court itself provided a sufficient factual basis to warrant a hearing when it commented [at trial] that defense counsel had not cross-examined the alleged victim regarding the making of prior

false allegations.” However, even if we were to conclude counsel was deficient for failing to cross-examine the victim regarding prior false allegations, Wilcox fails to show how he was prejudiced by that deficiency.

¶9 Wilcox’s motion does not allege that the victim would have admitted making prior false sexual assault accusations had counsel cross-examined her on that subject. Moreover, any testimony regarding prior false sexual assault accusations would have been cumulative to other evidence of the victim’s reputation for untruthfulness. *See State v. DeSantis*, 155 Wis. 2d 774, 793, 456 N.W.2d 600 (1990) (evidence of prior untruthful allegations was cumulative of other evidence attacking the complainant’s credibility). Because the postconviction motion failed to allege facts that, if proven, would establish the prejudice prong, Wilcox was not entitled to an evidentiary hearing and the circuit court properly denied the motion. *See Bentley*, 201 Wis. 2d at 313-18.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

