COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1752-CR **Cir. Ct. No. 2009CF1455**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE NICHOLAS LATORRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jose Nicholas Latorre appeals from a judgment of conviction, entered upon a jury's verdicts, to three counts of repeated sexual assault of the same child. He also appeals from an order denying his postconviction motion without a hearing. Latorre contends that trial counsel was

ineffective for not objecting to prior consistent statements, which were inadmissible hearsay, and for failing to call an expert witness to support the defense theory that the allegations against Latorre were fabricated. Latorre further believes that the circuit court erroneously exercised its discretion when it denied his postconviction motion without a hearing. We disagree with Latorre's contentions, and we affirm the judgment and order.

BACKGROUND

¶2 Latorre was charged with three counts of repeated sexual assault of the same child for alleged repeated sexual contact, molestation, and intercourse with three brothers during an extended period of time in which Latorre lived in their home at their mother's invitation.[1] These acts allegedly occurred between approximately February 1, 1998, and March 4, 1999, when the children were between six and eight years of age and Latorre was seventeen or eighteen. The acts were not reported until more than a decade later.

¶3 The case was tried to a jury. Latorre defended on the theory that the allegations were falsified because his homosexuality was threatening to his host family's religious beliefs. He attempted to show the likelihood of falsification by pointing out, among other things, that the children came from a dysfunctional family, that they had received physical discipline from their father, and that two of them—twins—had learning disabilities. The jury convicted Latorre on all three

[1] The criminal complaint described Latorre as a cousin to the children, but at least one of the children testified at trial that he only thought Latorre was a cousin and that in reality, Latorre is not related to them.

counts, and he was sentenced to eight years' imprisonment on each count, to be served consecutively.[2]

¶4 Latorre filed a postconviction motion alleging, as relevant here, that trial counsel was ineffective for failing to object to certain testimony that Latorre believes was inadmissible hearsay because it contained prior consistent statements. He also claimed that trial counsel was ineffective for failing to call an expert witness to testify in support of his theory that the assault claims were fabricated.

¶5 The circuit court denied the motion without a hearing, agreeing with the State's analysis that Latorre had not identified any instances of inadmissible prior consistent statements and concluding that if any were admitted, they did not undermine confidence in the verdict. The circuit court also concluded that Latorre's motion was insufficiently pled with regard to the expert, because although he had identified the types of expert testimony he thought trial counsel should have produced, he had not identified any expert who was willing to so testify.

DISCUSSION

¶6 "Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing."

[2] The sentences are indeterminate because the offenses predate the Truth-In-Sentencing revisions to the criminal code.

State v. Balliette, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. This presents a question of law that we review *de novo*. ***Allen***, 274 Wis. 2d 568, ¶9. "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.*** We review such a decision only for an erroneous exercise of that discretion. ***Id.*** In examining the sufficiency of a postconviction motion, we review only the allegations within its four corners, not any additional allegations contained within a brief. ***Id.***, ¶27.

¶7 There are two components to ineffective-assistance claims: the defendant must show that counsel performed deficiently and that this performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel was ineffective is a mixed question of fact and law. *See* ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. We uphold the circuit court's factual findings unless clearly erroneous, but whether those facts rise to the level of ineffectiveness is a question of law. *See* ***State v. Domke***, 2011 WI 95, ¶33, 337 Wis. 2d 268, 805 N.W.2d 364.

I. Failure to Object to Prior Consistent Statements

¶8 On appeal, Latorre first argues that "counsel was ineffective when, by not objecting, he allowed the presentation to the jury of improperly bolstering prior consistent statements of the alleged victims." (Formatting omitted.) He contends that these prior consistent statements "made the accusations seem the more true and credible" than they would have been otherwise.

¶9 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter asserted." WIS. STAT. § 908.01(3) (2011-12).[3] Hearsay is ordinarily inadmissible. *See* WIS. STAT. § 908.02. Statements about Latorre's abuse that the victims had previously given somewhere other than during their trial testimony would generally be hearsay. However, prior statements are not hearsay if the declarant testifies and is subject to cross-examination and the statements are (1) consistent with the declarant's testimony, and (2) "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" *See* § 908.01(4)(a)2.; *see also* ***State v. Peters***, 166 Wis. 2d 168, 176, 479 N.W.2d 198 (Ct. App. 1991).

¶10 Here, Latorre's theory was that the victims' family's fear and paranoia of Latorre's homosexuality might be an improper influence or a motive for fabricating the allegations. Latorre contends that the victims' prior consistent statements about the abuse were nevertheless inadmissible in rebuttal of his theory because none of those statements predate the discovery of Latorre's sexual orientation. *See* ***Peters***, 166 Wis. 2d at 177 ("[P]rior consistent statements must predate the alleged recent fabrication or improper influence or motive before they have probative value."). That is, the family knew that Latorre was a homosexual before the victims ever accused him of sexual assault. The problem with this claim, however, is that Latorre has not actually identified any prior consistent statements to which trial counsel should have objected.

¶11 In the postconviction motion, Latorre identified only two portions of testimony that he believes invited objection. As described in the appellate brief:

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> The boys also repeatedly testified about their prior out-of-court "truthful" accounts of the abuse, while reporting Latorre's abuse to relatives, social workers, and police officers. [Record citation 1.] Trial counsel did not consistently object to this repeated (indirect) presentation of these bolstering prior consistent statements to the jury. [Record citation 2.]
>
> ….
>
> The boys' aunt … testified extensively about how she had discovered an incriminating text message … ; what the message allegedly stated … ; about how she then examined the boys and what they said about having been abused; about how she had found the boys coming across as "normal" and believable while discussing the abuse with her for the first time. [Record citation 3.]

¶12 Record citations 1 and 2 are to testimony from just one of the victims. Thus, claims that "[t]he boys repeatedly testified" about prior consistent statement are at best unsubstantiated and at worse patently false. More significantly, though, neither citation is to any testimony involving actual statements. "A 'statement' is … an oral or written assertion[.]" WIS. STAT. § 908.01(1). "[A]n 'assertion' … means an expression of a fact, condition, or opinion." ***State v. Kutz***, 2003 WI App 205, ¶38, 267 Wis. 2d 531, 671 N.W.2d 660.

¶13 At the first record citation, the victim is testifying about how Latorre's abuse came to light. He explained that his older brother had a phone with a text message that was viewed by the boys' aunt. The testimony does not identify the source of the message and merely claims there was "a text message in it describing a message of us being abused." There are no descriptions of any "out-of-court 'truthful' accounts of the abuse." That is, the witness does not describe any prior statements he gave relating the nature or circumstances of the

abuse, or even any prior assertion that Latorre was the abuser. Further, there is no testimony describing any of the other witnesses' prior statements.

¶14 The second record citation includes the victim's explanation that he "reported it"—"it" being Latorre's sexual abuse—to a therapist and his dad, and that the police were called. When a report was made to police, several people were present, including the police, the therapist, the father, the grandmother, the aunt, and the three victims. This testimony, though, is merely a recitation of a historical timeline of events. It, too, contains no testimony regarding any of the witnesses' prior statements.

¶15 If the victim was not testifying about prior assertions—and, thus, statements—then there was no basis on which trial counsel could have or should have objected to "prior consistent statements." Counsel is not ineffective for failing to pursue a meritless objection. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶16 The third record citation Latorre identifies is to the boys' aunt's testimony. She described discovering the text message that alluded to abuse and the conversation she had with the oldest victim, who owned the phone. It is true that much of the aunt's testimony may have been hearsay—though not necessarily prior consistent statements. However, contrary to Latorre's claim that her testimony was eventually interrupted on the court's own hearsay objection, we note that trial counsel requested a sidebar at which he indicated a standing hearsay objection to the aunt's testimony. When the circuit court eventually interrupted to say the aunt's testimony was hearsay, it was in response to that standing objection. Thus, because counsel actually did object to this testimony, we discern no deficiency in counsel's performance.

¶17 In his appellate brief, Latorre identifies an additional portion of testimony to which he believes trial counsel should have objected. He asserts: "The boys' *repeated accusations* – to grandma, aunt, a social worker, a therapist, and the Florida police etc… – which the boys self-vouched on the stand had been 'truthful,' see Trial Tr. At 5, 8/31/2010 (A.M. proceedings), made the accusations seem the more true and credible[.]" (Ellipses in original.) Though we need not consider this argument, *see* ***Allen***, 274 Wis. 2d 568, ¶27, we note that at this record cite, only one victim is testifying, and the State actually introduces admissible prior *inconsistent* statements.

¶18 The witness testifying is the same singular victim whose testimony was cited in the postconviction motion—thus, we still only have one victim's testimony, not the testimony of "the boys." The State had asked him whether there were times Latorre touched that victim's face with his penis without putting it in the victim's mouth. When the victim answered "no," the State asked whether he recalled speaking with a detective and telling the detective "that there was an occasion when [he was] awakened by Mr. Latorre slapping [him] in the face with his penis." The victim then answered "yes." A declarant's prior inconsistent statements are not hearsay. *See* WIS. STAT. § 908.01(4)(a)1. Further, the witness does not testify about the victims' "repeated accusations." We discern no "self-vouch[ing]" of truthfulness, and no basis for counsel to object.

¶19 A review of Latorre's arguments about a lack of objection to "prior consistent statements" in this case reviews that there was no deficient performance by counsel, either because there was no basis on which to object to the cited testimony or because counsel actually did object. The record conclusively demonstrates that Latorre is not entitled to relief on this ground. It was not erroneous for the circuit court to decline to grant a hearing.

II. Failure to Call an Expert Witness

¶20 As noted, Latorre defended against the assault allegations by attempting to show they were fabricated. To demonstrate the likelihood of the statements' falsity, Latorre pointed out, among other things, that the children came from a dysfunctional family, that they had received physical discipline from their father, and that two of them—twins—had learning disabilities. In the postconviction motion, Latorre contends that counsel was ineffective for failing to investigate and discover evidence supporting the selected theory of defense. Latorre claims in his appellate brief that "additional rich evidence existed, and should have been discovered and presented," like "expert testimony about the correlation of delayed reporting and the reports' falsity and expert testimony about kids' tendency to fill in memory gaps with lies, and expert testimony that child sexual experimentation does not necessarily correlate with sexual assaults[.]"

¶21 The circuit court denied Latorre's postconviction motion without a hearing, concluding that Latorre had "failed to provide any supporting affidavit from a qualified expert who would have offered such testimony." Latorre responds on appeal that "[n]o authority known to Latorre states that the factual allegations in the Post-Conviction Motion must be supported by an expert's affidavit."

¶22 Latorre should not be so literal: the circuit court's ruling is less about specifically requiring a supporting affidavit and more about the sufficiency of the postconviction motion. A postconviction motion must contain "sufficient material facts—i.e., the name of the witness (who), the reason the witness is important (why, how), and facts that can be proven (what, where, when)—that

clearly satisfy the [applicable] standard" to warrant a hearing on the motion. ***Allen***, 274 Wis. 2d 568, ¶24.

¶23 Latorre's motion claimed:

> [I]t is ineffective assistance of counsel for failing to obtain a defense expert to testify that delayed reporting is consistent with false accusations of abuse.… The defense presented that the children came from a dysfunctional family. Without expert testimony the defense could not present evidence to the jury that children from dysfunctional families … often fabricate accusations of abuse household [sic].… Without an expert to explain that accusations that come from children from dysfunctional households are consistent with false accusation, the jury has no evidence in the record to support its argument.… [T]here was no expert to say testify that adolescents who have no actual memory mix portions of truths with portions of lies. Latorre will present such expert testimony at the *Machner*[4] hearing. Evidence was presented that two of the three victims had learning disabilities…. There was no expert to testify that adolescents with a history of learning disabilities are more easily convinced by untrained and loving adults who want the adolescent to believe that they have been abused when, in fact, it is a false accusation. Testimony was adduced … that two of the three victims had sexually acted out with one another…. There was no expert testimony that brothers – twins, often experiment sexually in the privacy of their own bedrooms and that such behavior is just as consistent with a false accusation of sexual assault as a true sexual assault accusation.

(Lack of paragraph breaks in original.)

¶24 At best, Latorre's postconviction motion alleges a "why" and a "how." It clearly fails to establish a "who," as Latorre did not identify who would provide this expert testimony. In a supporting brief, Latorre attempted to overcome this deficiency by citing testimony given by an attorney and a

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

psychologist at a postconviction hearing in another case from 2004. Aside from the fact that our review is limited to the four corners of the motion itself, Latorre does not allege he would have called either witness. Indeed, postconviction counsel stated she had not selected an expert because the availability of such witness was contingent upon scheduling and cost. In any event, Latorre has also not established that his two quoted witnesses, even assuming their availability, hold the same conclusions and would offer the same expert testimony today in this case as they did nine years ago in a different case.

¶25 The postconviction motion also fails to adequately specify a "what." Without knowing who would testify, it is difficult if not impossible to allege what they would say. Thus, the postconviction motion contains only conclusory assertions that some expert testimony might have been found from someone to support the defense theory. However, a defendant "cannot stand on conclusory allegations, hoping to supplement them at the hearing, because the hearing is not intended as a fishing expedition." ***State v. Love***, 2005 WI 116, ¶75, 284 Wis. 2d 111, 700 N.W.2d 62.

¶26 The circuit court correctly concluded that Latorre's postconviction motion fails to allege sufficient facts entitling him to relief with regard to expert testimony. It was, therefore, a discretionary decision for the circuit court as to whether to grant a hearing. We discern no erroneous exercise of that discretion in the motion's denial.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.