COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2345 **Cir. Ct. No. 1999CF252**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES EGGENBERGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Charles Eggenberger appeals an order denying his postconviction motion for a new trial based on newly discovered evidence. We conclude Eggenberger's motion was procedurally barred, pursuant to WIS. STAT.

§ 974.06(4).[1] We also conclude Eggenberger's newly discovered evidence claim fails on the merits. We therefore affirm.

BACKGROUND

¶2 On May 10, 1999, Eggenberger was charged with three counts of first-degree sexual assault of a child. The victim was Eggenberger's ten-year-old step-granddaughter. Eggenberger did not present any evidence at trial, choosing instead to put the State to its burden of proof. The jury found Eggenberger guilty of all three charges.

¶3 At the sentencing hearing, Eggenberger, represented by a new attorney, argued the assaults he committed were out of character and were caused by his use of the medication Prozac, which had been prescribed to treat his posttraumatic stress disorder. Eggenberger relied on a report authored by forensic psychiatrist George Palermo, who explained that Prozac "at times … causes mental confusion and excitement. It has been thought by some experts to precipitate suicide, especially when combined with a benzodiazepine [a type of anti-anxiety medication Eggenberger was also taking] and alcohol." Palermo opined that Eggenberger's "molestation of his granddaughter … may be the outcome of the disinhibiting, confusion-producing action of Prozac[.]"

¶4 The court sentenced Eggenberger to an indeterminate twenty-year prison term on count one. On counts two and three, sentence was withheld and Eggenberger received two twenty-year terms of probation, concurrent to one

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

another but consecutive to his sentence on count one. Eggenberger moved for resentencing, arguing the sentencing court violated his right to due process by considering certain letters from the victim's extended family. The court denied Eggenberger's motion.

¶5 After retaining a third attorney, Eggenberger filed a direct appeal. He argued the trial court erred by admitting hearsay statements and statements he made to law enforcement after invoking his right to counsel. He also renewed his argument that the sentencing court erroneously considered letters from the victim's family. We affirmed Eggenberger's conviction, and the supreme court denied his petition for review.

¶6 On February 24, 2009, Eggenberger moved for sentence modification, pursuant to WIS. STAT. § 974.06. Now represented by a fourth attorney, Robin Shellow, Eggenberger argued that new research into Prozac's negative side effects constituted a new factor warranting sentence modification. He relied on new reports by psychologists Ann Blake Tracy and R. Bronson Levin to support his contention that his use of Prozac, along with alcohol and an anti-anxiety medication, made him disinhibited and confused, which "caused his out-of-character conduct with [the victim] and his inability to recall or admit it." Eggenberger also argued he had been sentenced based on inaccurate information. The circuit court denied Eggenberger's motion, and we affirmed the court's decision.

¶7 Eggenberger subsequently retained a fifth attorney. On December 2, 2011, he filed another WIS. STAT. § 974.06 motion, this time seeking a new trial

based on newly discovered evidence.[2] As newly discovered evidence, Eggenberger cited "the same evidence that was the basis of [the earlier] motion to modify sentence—the [e]ffects that the prescribed medication Prozac combined with [an anti-anxiety medication] had on Mr. Eggenberger and the extent to which it impacted his behavior." He contended this evidence would have changed the outcome of his trial because it would have allowed his attorney to present an involuntary intoxication defense.

¶8 In response, the State argued Eggenberger's motion was procedurally barred by WIS. STAT. § 974.06(4) because Eggenberger could have raised his newly discovered evidence argument in his prior postconviction motion. In reply, Eggenberger asserted he had a sufficient reason for failing to raise his newly discovered evidence claim because Shellow, his previous postconviction attorney, was ineffective. Following a hearing, the circuit court assumed, without deciding, that Shellow had provided ineffective assistance. However, the court concluded Eggenberger's newly discovered evidence claim failed on the merits because it was not reasonably probable a new trial would produce a different result. Eggenberger now appeals.

[2] Eggenberger also argued he was entitled to a new trial in the interest of justice. The circuit court concluded that argument was not "properly before the [c]ourt[.]" Eggenberger does not raise an interest of justice argument on appeal. "[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned." ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

DISCUSSION

I. Eggenberger's motion was procedurally barred

¶9 WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. *See* ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, the defendant must raise "[a]ll grounds for relief available to [him or her] under [§ 974.06] … in his or her original, supplemental or amended motion." WIS. STAT. § 974.06(4). A defendant may avoid this procedural bar by showing that he or she had a "sufficient reason" for failing to raise a claim in a previous postconviction motion or appeal. ***Id.***; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Whether a defendant has provided a sufficient reason for failing to raise a claim is a question of law that we review independently. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

¶10 It is undisputed that Eggenberger could have raised his newly discovered evidence argument in his 2009 postconviction motion. In the circuit court, Eggenberger argued he had a sufficient reason for failing to raise the argument because Shellow was ineffective. Ineffective assistance of postconviction counsel may provide a sufficient reason for a defendant's previous failure to raise a claim. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, a defendant has a right to effective assistance of counsel only in those proceedings where the right to counsel is constitutionally guaranteed. *See* ***Coleman v. Thompson***, 501 U.S. 722, 752 (1991). A defendant does not have a constitutional right to counsel in a postconviction proceeding under WIS. STAT. § 974.06. ***State ex rel. Warren v.***

Schwarz, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998); *see also* ***Pennsylvania v. Finley***, 481 U.S. 551, 555 (1987) (right to counsel extends only to first appeal of right and does not extend to a collateral attack on a conviction). Consequently, a defendant has no right to *effective* assistance of counsel in the context of a § 974.06 motion.

¶11 Because Eggenberger had no right to effective assistance of counsel in the 2009 postconviction proceedings, he cannot establish an ineffective assistance claim based on Shellow's performance. Accordingly, the State contends Shellow's performance cannot constitute a sufficient reason for failing to raise the newly discovered evidence claim because there is "no legal authority … deeming counsel's performance in an earlier proceeding a 'sufficient reason' absent a constitutional [ineffective assistance] claim." Eggenberger fails to respond to this argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). Aside from Shellow's performance, Eggenberger does not argue he had any other reason for failing to raise the newly discovered evidence claim in 2009. As a result, we conclude he was procedurally barred from raising that claim in his 2011 motion.

¶12 Moreover, even if Eggenberger had a right to effective assistance of counsel in the 2009 proceedings, Shellow was not ineffective by failing to raise the newly discovered evidence claim. To prove ineffective assistance, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To demonstrate prejudice, "[t]he 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.*** at 694. If a defendant fails to satisfy one prong of this analysis, we need not address the other. ***Id.*** at 697. The ultimate issue of whether a defendant received ineffective assistance is a question of law that we review independently. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶13 Eggenberger argues Shellow performed deficiently by failing to argue that the Tracy and Levin reports, along with new research on Prozac's side effects, constituted newly discovered evidence entitling him to a new trial. He contends that, had this evidence been available at his original trial, it would have allowed him to present an involuntary intoxication defense, which would likely have prompted the jury to acquit him. We disagree. Eggenberger has failed to establish that the proffered evidence would have supported a viable involuntary intoxication defense.

¶14 "An intoxicated or drugged condition of the actor is a defense only if such condition … [i]s involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed[.]" WIS. STAT. § 939.42(1). To receive a jury instruction on involuntary intoxication, Eggenberger would have had to produce "some evidence that his intoxication … affected his ability to distinguish right from wrong." *See* ***State v. Gardner***, 230 Wis. 2d 32, 45, 601 N.W.2d 670 (Ct. App. 1999). In his appellate briefs, Eggenberger asserts:

- "[I]t was unknown at the time of the offense that Mr. Eggenberger's use of the prescribed Prozac could cause severe psycho-somatic reactions."

- The prescribed medications "had an adverse [e]ffect on [Eggenberger]" and "caused [him] to lack judgment and affected his behavior. This extreme and inadvertent lack of judgment led to the commission of this crime[.]"

- Taking Prozac "lowered [Eggenberger's] inhibitions and caused him to be confused[.]"

- Tracy's report and testimony "support[ed] the conclusion that Mr. Eggenberger was essentially poisoned by the dose of Prozac he was prescribed."

- Eggenberger did not know his medications would cause "the Serotonin Syndrome described by Dr. Tracy."

- Around the time of the offenses, Eggenberger "displayed strange behavior" that made his wife think he was developing "dementia," but Tracy explained this behavior was a symptom of "Prozac poisoning."

- Tracy testified the elderly are particularly at risk for adverse reactions to Prozac.

These assertions do not provide any evidence that Eggenberger's medications made him unable to distinguish between right and wrong with respect to the sexual assaults of his step-granddaughter. Eggenberger does not define the terms "psycho-somatic reactions," "Serotonin Syndrome," and "Prozac poisoning" or suggest that these conditions affect a person's ability to tell right from wrong. At most, Eggenberger has shown that his medications "caused [him] to lack judgment" and lowered his inhibitions. This is insufficient to support an involuntary intoxication defense.

¶15 Because Eggenberger's new evidence would not have supported an involuntary intoxication defense, Shellow did not perform deficiently by failing to raise a newly discovered evidence claim in the 2009 postconviction motion. *See* ***State v. Tolliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel does not perform deficiently by failing to make a meritless argument). Thus, even

if we assume Eggenberger had a right to effective assistance in the 2009 proceedings, he has not shown that Shellow was ineffective. He has therefore failed to present a sufficient reason for not raising his newly discovered evidence claim in 2009. Consequently, he was procedurally barred from raising that claim in 2011.

II. Eggenberger's motion fails on the merits

¶16 In addition, Eggenberger has not established that his proffered evidence about Prozac's negative side effects entitles him to a new trial. To obtain a new trial based on newly discovered evidence, a defendant must prove, by clear and convincing evidence, that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant makes this showing, the circuit court must determine whether there is a reasonable probability that a new trial would produce a different result. ***Id.*** A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt. ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis. 2d 28, 750 N.W.2d 42.

¶17 We review a circuit court's decision on the first four prongs of the newly discovered evidence test for an erroneous exercise of discretion. ***Id.***, ¶¶31-32. Whether there is a reasonable probability that a new trial would produce a different result is a question of law that we review independently. ***Id.***, ¶33. Here, the circuit court determined Eggenberger had satisfied the first four prongs of the test but had failed to prove it was reasonably probable a new trial would produce a

different result. We agree with the circuit court that Eggenberger failed to meet the final prong of the newly discovered evidence test. However, we also conclude Eggenberger failed to prove the second and third prongs by clear and convincing evidence.

¶18 With respect to the second prong, Eggenberger did not establish he was not negligent in seeking the evidence. Eggenberger contends he could not have discovered the evidence before his trial because "the main body of research" into Prozac's side effects was not developed until 2004. Yet, in our decision affirming the denial of Eggenberger's 2009 postconviction motion, we explained that the "new factor" evidence at issue there (which Eggenberger concedes is the same as the "newly discovered evidence" at issue here) was essentially the same evidence Eggenberger presented at the sentencing hearing. We also observed that, at the hearing on Eggenberger's 2009 motion, Tracy conceded that "'roughly a decade of research and … publication [on Prozac's side-effects],' including her own work, existed before Eggenberger was sentenced." Thus, Eggenberger's own expert admitted that the basic evidence Eggenberger now proffers as "newly discovered" was available before Eggenberger's trial. Aside from a conclusory assertion that he "has actively pursued any and all research regarding the [e]ffects of Prozac[,]" Eggenberger does not explain why he failed to discover this evidence before he was convicted. He has therefore failed to prove by clear and convincing evidence that he was not negligent in seeking the evidence.

¶19 Regarding the third prong, Eggenberger has not proven the evidence is material to an issue in the case. Eggenberger argues the evidence is material because it would allow him to present an involuntary intoxication defense. However, we have already concluded the evidence does not support an involuntary intoxication defense because it does not show that Eggenberger was incapable of

distinguishing between right and wrong. *See supra*, ¶14. Eggenberger does not argue the evidence is material for any other reason.

¶20 Finally, we agree with the circuit court that it is not reasonably probable a new trial would produce a different result. Eggenberger argues that if the jury had heard his new evidence about Prozac's side effects, it would likely have acquitted him based on his involuntary intoxication theory. As discussed above, Eggenberger's evidence does not support an involuntary intoxication defense. However, even if the jury had been instructed on involuntary intoxication, there is no reasonable probability of a different result because a crucial piece of evidence critically undermines Eggenberger's claim that his medications made him incapable of distinguishing between right and wrong.

¶21 On May 5, 1999, police recorded a telephone call between Eggenberger and the victim. The recording was played at trial, and a transcript of the conversation was introduced into evidence.[3] During the conversation, the victim mentioned that she was thinking about telling her parents Eggenberger touched her inappropriately. Eggenberger told the victim not to tell her parents because "[i]t will wreck the family." The following exchange then took place:

> [Victim]: You know when you were licking me in the crotch and in the breasts?
>
> Eggenberger: Yeah.

[3] The appellate record does not contain either the recording of the telephone call or the transcript provided to the jury. Following the State's lead, we therefore rely on a summary of the recording found in the criminal complaint. Eggenberger does not argue that this summary is inaccurate or incomplete. Moreover, as the appellant, it was Eggenberger's responsibility to ensure that the record was sufficient for us to decide the issues presented by his appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). When an appellant fails to provide a complete record for our review, we assume that any missing materials support the circuit court's decision. ***Id.***

> [Victim]: It made me feel bad. Why did you do that?
>
> Eggenberger: It made you feel bad?
>
> [Victim]: Hmmm-mmm.
>
> Eggenberger: Well, I did it because I thought it would make you feel good and you liked it.
>
> [Victim]: But I didn't.
>
> Eggenberger: Ok, well then I apologize. I apologize.

Eggenberger discouraged the victim from reporting the assaults to her family, telling her he would go to jail for the rest of his life and her father would probably kill him. He stated, "[I]f you love me …, you won't say anything to anybody." When the victim informed Eggenberger that "they said in school that I should tell[,]" he responded:

> Well, yeah, but you don't have to do everything they tell you in school because the people in school don't know everything about everything. Yeah, I know what they are saying and I know why they are saying it, but there are some things, some things are better left unsaid, and this is one of them.

Eggenberger told the victim he was "scared" and tried to get her to promise she would not tell her parents about the assaults. He also promised to treat her with "respect, courtesy, friendship, cuz I love you."

¶22 It is not reasonably probable that a jury, after hearing both this evidence and Eggenberger's claimed new evidence about Prozac's side effects, would accept Eggenberger's theory that he was incapable of distinguishing between right and wrong when he assaulted the victim. The recorded call reveals that, contrary to his later claims, Eggenberger remembered committing the assaults. This critically weakens Eggenberger's claim that his medications made him so confused he later had no memory of assaulting the victim. Further, the call

shows that, less than one week after the last assault was committed, Eggenberger was aware his conduct was wrong.[4] Throughout the call, Eggenberger used various tactics in an attempt to convince the victim to keep the assaults secret, including: justifying his own actions and shifting blame to the victim by telling her he thought she liked the sexual contact; telling the victim about the bad things that would happen if she reported the assaults; telling the victim that, if she loved him, she would not report the assaults; discrediting advice the victim received from school personnel; and promising to treat the victim with respect in the future. Eggenberger would not have made these remarks unless he understood that assaulting the victim was wrong.

¶23 Eggenberger has therefore failed to satisfy the second, third, and fifth prongs of the newly discovered evidence test. Thus, in addition to being procedurally barred, his motion for a new trial was properly denied on the merits.

By the Court.—Order affirmed.

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

[4] The assaults took place during mid-April and the first week of May in 1999. The telephone conversation between Eggenberger and the victim occurred on May 5, 1999. Eggenberger does not argue that he stopped taking Prozac between the date of the last assault and the date of the recorded telephone call. Given the proximity of the phone call to the assaults, no reasonable jury would accept Eggenberger's theory that he could not distinguish between right and wrong at the time of the assaults.