COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1246-CR **Cir. Ct. No. 2011CF1197**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD LAWRENCE KOBLESKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Donald Lawrence Kobleske appeals a judgment convicting him of attempted second-degree sexual assault with use of force. He also appeals an order denying his postconviction motion. Kobleske argues that his trial lawyer ineffectively represented him during his jury trial: (1) by failing to

introduce police officer testimony or a police report to show that there was no physical evidence of the assault found at the scene of the crime; and (2) by failing to introduce evidence that the victim reported a "similar assault under similar conditions" in the past. We affirm.

¶2 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶3 Kobleske first contends that his trial lawyer ineffectively represented him because he should have introduced police officer testimony or a police report to show that no physical evidence was found in the area where the victim said the attack occurred. This argument fails because Kobleske cannot show that he was prejudiced.

¶4 Police Officer Francis Rotter was asked at trial to describe the area where the assault occurred. He testified that there was some snow on the ground, some dry patches and also some wet patches because the snow had melted on the sidewalk. He testified that there was an area of lawn or dirt near the scene. When asked whether he had identified any items to send to the crime lab for analysis, he said that he did not collect any items for the crime lab. On cross-examination, Officer Rotter testified that the victim did not have any cuts on her face, bruising

to her body or torn clothing. He also testified that Kobleske did not have any abrasions on his face or hands that indicated that he had been in a fight.

¶5 Kobleske cannot show that there is a reasonable probability that the result of the trial would have been different if his lawyer had introduced the police report or asked additional questions of Officer Rotter about the lack of physical evidence at the scene. As previously summarized, Officer Rotter testified that he did not collect any physical evidence and testified that neither the victim nor Kobleske bore the signs of a physical confrontation. If Kobleske's lawyer had introduced the police report or more directly asked Officer Rotter about the lack physical evidence, it would have added nothing to what was already presented to the jury. Kobleske cannot show that he was prejudiced.

¶6 Kobleske next argues that his trial lawyer rendered constitutionally ineffective assistance by failing to seek introduction of evidence about the victim's claim of a "similar assault under similar conditions." When the police interviewed the victim about this assault, she told them that she had been sexually assaulted two times before in her life, one time in middle school and one time a year earlier. Kobleske contends that his lawyer should have attempted to introduce evidence about the assault a year earlier because the victim did not report it to the police at the time it happened. He contends her failure to report it undermines her credibility because it shows she may have been lying about it.

¶7 There are several problems with Kobleske's argument. First, Kobleske has made no cogent argument to support his claim that the victim's decision not to report the prior assault to the police at the time it happened undermines her credibility. Victims may not report crimes when they occur for any number of reasons that have no bearing on their credibility. Second, Kobleske

has failed to show that there would have been any legal basis for admitting evidence about the prior assault. Wisconsin's Rape Shield Law, WIS. STAT. § 972.11(2)(b) (2011-12),[1] generally prohibits the introduction of evidence about a victim's prior sexual history, and Kobleske has not provided any factual basis to support his implicit argument that the prior allegation was untruthful. Finally, Kobleske has provided no specific factual assertions to support his claim that the attack the year before was a "similar assault under similar conditions."

¶8 In sum, the circuit court properly denied Kobleske's postconviction motion without a hearing because his arguments were conclusory and undeveloped, and he failed to allege specific facts which, if true, would have entitled him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996) (a defendant cannot make conclusory allegations in a postconviction motion, hoping to supplement them at a hearing on the motion).

By the Court.—Judgment and order affirmed.

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

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