COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1168-CR **Cir. Ct. No. 2007CF5865**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. LEE-KENDRICK,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Robert D. Lee-Kendrick appeals from a judgment of conviction entered on a jury verdict for two counts of repeated sexual assault of a child and one count of second-degree sexual assault of a child, contrary to

WIS. STAT. §§ 948.025(1)(e) and 948.02(2) (2003-04, 2005-06, 2007-08).[1] Lee-Kendrick also appeals from an order denying his postconviction motions for a new trial and resentencing. We affirm the judgment and order.

BACKGROUND

¶2 In December 2007, Lee-Kendrick was charged with a number of sexual assaults concerning three girls, two of whom lived with him at various times in their lives and one of whom was an overnight guest in his home for a single night. Lee-Kendrick pled no contest to three felonies, but was later allowed to withdraw his pleas based on ineffective assistance provided by his trial counsel concerning whether Lee-Kendrick could appeal a specific trial court ruling.

¶3 The case proceeded to trial in June 2011. The jury was asked to consider three sexual assault charges against Lee-Kendrick: (1) repeated sexual assault of one girl between January 2004 and November 2007, when she was less than sixteen years of age; (2) repeated sexual assault of a second girl between June 2004 and November 2007, when she was less than sixteen years of age; and (3) sexual intercourse with a third girl on January 27, 2007, when she was less than sixteen years of age.[2]

¶4 All three girls testified that Lee-Kendrick had penis-vagina sexual intercourse with them in one or more of his residences. Lee-Kendrick testified

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

[2] The jury also considered four additional charges from a separate criminal case that was joined for trial: three counts of possession of child pornography and one count of child sexual exploitation. The jury found Lee-Kendrick not guilty of those four charges, so we will not discuss them further.

that he did not have sexual intercourse or contact with any of the girls and that they were lying because he threatened to take away material possessions from two of them and refused to let one of the girls visit her grandmother. There was no physical evidence to substantiate the charges.[3] In their closing arguments, both parties agreed that the case came down to credibility: if the jurors believed the girls' testimony, they would find Lee-Kendrick guilty. If they believed Lee-Kendrick, they would acquit him. The jury found Lee-Kendrick guilty of the three sexual assault charges.

¶5 At sentencing, Lee-Kendrick faced a maximum sentence of forty years on each count. The trial court sentenced Lee-Kendrick to three consecutive sentences of fifteen years of initial confinement and ten years of extended supervision.

¶6 Postconviction counsel was appointed for Lee-Kendrick. Lee-Kendrick filed two postconviction motions. First, he sought a new trial on grounds that trial counsel provided ineffective assistance by failing to object to certain questions the prosecutor asked Lee-Kendrick on cross-examination and by failing to impeach two of the girls with prior inconsistent statements. Second, Lee-Kendrick sought resentencing on grounds that the trial court relied on inaccurate information at sentencing. The postconviction court, which was assigned the case due to judicial rotation and did not preside over the trial and

[3] At trial, one of the girls identified a photograph of a penis entering a vagina and said that the photograph was taken by Lee-Kendrick as he had sexual intercourse with her, but there was no DNA evidence or other physical evidence of the assaults.

sentencing, denied both motions without a hearing after reviewing briefing from both parties.[4] This appeal follows.

DISCUSSION

¶7 Lee-Kendrick argues that he is entitled to a new trial for the reasons outlined in his postconviction motion and that the postconviction court erred by not granting Lee-Kendrick's request for a ***Machner***[5] hearing concerning his trial counsel's alleged ineffectiveness. In the alternative, Lee-Kendrick seeks resentencing. We consider each issue in turn.

I. Postconviction motion for a new trial based on ineffective assistance.

A. Legal standards.

¶8 Lee-Kendrick's postconviction motion alleged that he was denied the effective assistance of counsel, which is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *See* ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland v. Washington***, 466 U.S. 668, 686 (1984)). To establish that an attorney's representation was constitutionally deficient, a defendant must prove: (1) "counsel's performance was deficient"; and (2) "the deficient performance resulted in prejudice to the defense." ***Id.*** When considering the first prong, "a court looks to whether the attorney's performance was reasonably effective considering all the circumstances." ***Id.***, ¶22. When considering the second prong,

[4] The Honorable Stephanie G. Rothstein denied the postconviction motions. The Honorable Dennis R. Cimpl presided over the trial and sentencing.

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

a court must consider "whether '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.***, ¶24 (quoting ***Strickland***, 466 U.S. at 694).

¶9 A defendant is not automatically entitled to a hearing on his postconviction motion. *See* ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48. "[A] defendant must 'allege [] facts which, if true, would entitle the defendant to relief.'" ***Id.*** (citation omitted; second set of brackets in original). Our supreme court has explained:

> "[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [postconviction] court may in the exercise of its legal discretion deny the motion without a hearing."

State v. Bentley, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). "If the defendant's motion and the record fail to meet these requirements, a [postconviction] court in its discretion may grant or deny an evidentiary hearing." ***Howell***, 301 Wis. 2d 350, ¶75.

¶10 On appeal, we determine independently whether a motion "'on its face alleges facts which would entitle the defendant to relief,' and whether the record conclusively demonstrates that the defendant is entitled to no relief." ***Id.***, ¶78 (citation and footnote omitted). When a "motion fails to allege sufficient facts entitling the defendant to relief or presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates the defendant is not entitled

to relief," then this court considers whether the postconviction court erroneously exercised its discretion when it decided to grant or deny a hearing. ***Id.***, ¶79.

B. Analysis of Lee-Kendrick's postconviction motion.

1. Failure to object to the State's cross-examination.

¶11 Lee-Kendrick's postconviction motion alleged that his trial counsel was ineffective in several ways. We begin with Lee-Kendrick's allegation that his trial counsel should have objected to several questions the State asked Lee-Kendrick on cross-examination concerning the house where each girl alleged at least one assault occurred. As background, we note that on direct examination, trial counsel asked Lee-Kendrick when he moved to that particular house in River Hills—which was referred to as a mansion during the trial—and how he was able to acquire the house.[6] Lee-Kendrick testified:

> When I stopped doing car stereos, I started doing small computer networking and stuff like that and went from that to meeting a guy who was getting rid of a lot of houses. And I came up with a program that actually—Well, I'm able to buy and sell property as an investment consultant but actually selling to urban community [sic]. Like single parent, single mother or single father, that couldn't get the property. I was able to get them to them through my investors and stuff.
>
> ….
>
> … It's a story of getting the place. The way we do the deals with the houses, we [are] able to catch them at low values, and we pay the mortgages on them…. [A] friend of mine was … about to lose the mansion, so I …

[6] These questions were asked after trial counsel asked Lee-Kendrick a series of questions about his employment and his relationships with two of the girls. The questions appear to have been asked to establish Lee-Kendrick's work history and credibility.

> was able to obtain that one. I really didn't want the mansion. I really, truly got the house for the kids.

¶12 On cross-examination, the State asked Lee-Kendrick about his acquisition of the large home. The following exchange occurred:

> [State:] How did you afford that home?
>
> [Lee-Kendrick:] I just told you. It was a—doing a real estate deal that we do through investors. That's how we got the house. The builder lost the house and foreclosure, and we [were] able to pick it up there.
>
> [State:] Who [were] your partners?
>
> [Lee-Kendrick:] Actually that was done by guys who always [did] it. That was done by C & E Mortgage with Chad Lee and, what's his name?
>
> [State:] Michael Lock?
>
> [Lee-Kendrick:] No.
>
> [State:] You know who he is?
>
> [Lee-Kendrick:] I know who he is, yeah.
>
> [State:] He was part of the real estate stuff too, correct?
>
> [Lee-Kendrick:] Yeah, yes. He knew that stuff too, yeah.

The State then moved on to questions about one girl's allegations.

¶13 In his postconviction motion, Lee-Kendrick faulted his trial counsel for not objecting to: (1) "questions about Mr. Lee-Kendrick's ability to pay for the house"; or (2) "questions regarding Michael Lock." The postconviction motion asserted that Lock was a criminal whose trial and convictions for "homicide, drug dealing, kidnapping and mortgage fraud … were sensational and covered extensively in the media during the years before this trial." Lee-Kendrick argued:

> The combination of the prosecutor's questions regarding Mr. Lee-Kendrick's ability to afford the home in River Hills, with questions regarding any relationship with Mr. Lock was irrelevant, inadmissible and prejudicial to the defendant. Specifically, the jury heard Mr. Lee-Kendrick testify that he obtained the house through "investors" and people who were buying and selling houses. He obtained the house in 2006, a time when Mr. Lock's organization was going strong. When the [S]tate asked about a relationship with Mr. Lock, the jury was left with the impression that Mr. Lee-Kendrick was somehow involved with Lock and his organization. None of this line of questioning was relevant to whether or not the victims in this case were sexually assaulted. Defense counsel should have objected to this line of questioning.
>
> The fact that the jury was concerned about this line of questioning is highlighted by questions they asked during deliberations. The jury asked for a copy of the defendant's testimony and one area in which they were interested was how he got the money to buy the house in River Hills. The [trial] court, in denying the request stated that this information was not relevant.

(Record citation omitted.)

¶14 Even if we were to accept Lee-Kendrick's premise that trial counsel should have objected to the State's questions on relevancy grounds—despite the fact that the issue of how Lee-Kendrick acquired the home was first raised on direct examination—Lee-Kendrick has not shown that he was prejudiced by the error. We fail to see how Lee-Kendrick's financing for the home where the alleged assaults took place would have affected the jury's determination of Lee-Kendrick's and the girls' credibility, which both parties agreed was the key issue in the case. Further, the name Michael Lock was mentioned only that single time in the entire trial. Lee-Kendrick's ability to afford the home, Lee-Kendrick's employment, and Michael Lock were not mentioned at all during closing arguments. There is no indication in the record that the jurors knew who Lock

was or would have drawn negative conclusions about Lee-Kendrick as a result of hearing that name one time.

¶15 As far as the jury asking to review certain testimony, we note that the jury at first asked the trial court if it could review "the entire transcript" of Lee-Kendrick's testimony. The trial court asked the jury to "narrow down what they needed" and the jury then asked for three parts of the transcript, including "regarding how he got the money to buy the house in River Hills." As noted, the trial court determined that was not relevant and declined to have that testimony read to the jury. The fact that the jurors asked to hear that testimony does not prove that the jury knew who Lock was or that they allowed that testimony to influence their verdict. It is pure speculation to suggest that the short testimony elicited by the State concerning the house and Lock was constitutionally prejudicial.

¶16 In short, the record conclusively demonstrates that there was not "'a reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different.'" *See* ***Balliette***, 336 Wis. 2d 358, ¶24 (citation omitted). Therefore, it was within the postconviction court's discretion whether to grant Lee-Kendrick a hearing on this issue. We conclude the postconviction court did not erroneously exercise its discretion when it chose to decide the issue without a hearing. *See* ***Howell***, 301 Wis. 2d 350, ¶79.

2. Failure to impeach the testimony of two of the girls.

¶17 The second area of alleged trial counsel ineffectiveness addressed in the postconviction motion concerned trial counsel's cross-examination of two of the girls. The first girl testified that she went to Lee-Kendrick's home on a single occasion to attend a birthday party for one of the other girls. She said Lee-

Kendrick approached her and told her "to come with him," which she did because she believed he wanted to talk to her. She said he took her into a bedroom, locked the door, talked with her about whether she was a virgin, made her touch his penis, touched his mouth to her vagina, and had sexual intercourse with her.

¶18 After the girl finished her direct testimony, trial counsel explored a variety of areas of the girl's testimony during a cross-examination that spanned fifteen pages of the transcript. He asked the girl whether she drank alcohol at the party, what Lee-Kendrick was wearing when he approached her, whether Lee-Kendrick threatened her, and whether she tried to stop Lee-Kendrick when he assaulted her. Trial counsel specifically asked the girl whether she had ever previously told anyone that Lee-Kendrick made her touch his penis before he had sexual intercourse with her. The girl answered that she had, and she said that she testified about it at the preliminary hearing. When asked, the girl also said that she did not know in whose bedroom the assault occurred. Finally, the girl testified that Lee-Kendrick ejaculated onto her stomach.

¶19 In his postconviction motion, Lee-Kendrick argued that trial counsel performed deficiently by not impeaching the girl with her preliminary hearing testimony from three-and-a-half years earlier. He argued that the girl's trial testimony varied from her preliminary hearing testimony, where she: (1) did not mention touching Lee-Kendrick's penis; (2) identified the particular bedroom where the assault occurred; and (3) said that Lee-Kendrick had ejaculated onto her and onto her friend's bed. Lee-Kendrick argued that if trial counsel had impeached the girl with those discrepancies, it "would have impacted her credibility."

¶20 We are not convinced that trial counsel's performance was constitutionally deficient or that Lee-Kendrick was prejudiced by trial counsel's performance. "The reasonableness of counsel's conduct must be evaluated 'on the facts of the particular case, viewed as of the time of counsel's conduct.'" ***Balliette***, 336 Wis. 2d 358, ¶23 (citation omitted). ***Balliette*** reiterated: "'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" ***Id.*** (citation omitted). Applying those standards, we do not agree with Lee-Kendrick that his trial counsel's decision not to impeach the girl with her preliminary testimony on those three issues was constitutionally deficient or prejudicial. The discrepancies were not so obvious as to suggest that the girl's credibility would have been seriously undermined.

¶21 Moreover, trial counsel effectively explored a variety of issues to undermine the girl's credibility, and even mentioned during closing argument the fact that it was the first time he had heard about the touching. "[C]ounsel is 'strongly presumed to have rendered' adequate assistance within the bounds of reasonable professional judgment," *see* ***id.***, ¶25 (citation omitted), and in this case, Lee-Kendrick has not overcome that presumption.

¶22 Lee-Kendrick's postconviction motion also asserted that Lee-Kendrick should have impeached another girl regarding "one main area of discrepancy." That girl, who ultimately testified about abuse that spanned a three-year period, did not mention in her November 2007 recorded statement to the police that she witnessed another girl being assaulted, but at the 2011 trial, she said that she and the other girl were forced to perform sex acts with each other and Lee-Kendrick at the same time, and that Lee-Kendrick videotaped them.

Lee-Kendrick argued in his motion that trial counsel should have impeached the girl for not mentioning those facts in her police interview.

¶23 Once again, we are not convinced that Lee-Kendrick has shown that trial counsel performed deficiently. Trial counsel's thorough cross-examination of the girl spanned twenty-seven pages of the transcript and included many questions designed to cast doubt on her credibility. We are not convinced that trial counsel performed deficiently when he did not ask the girl why she failed to mention during her initial police interview that Lee-Kendrick made her engage in sex acts with the other girl at Lee-Kendrick's direction. There are a host of reasons why the girl may not have mentioned it during her interview. Further, she testified about those sex acts at the preliminary hearing. It is doubtful that pointing out the girl's failure to mention the acts in her first interview would have seriously undermined the girl's testimony. Indeed, had trial counsel impeached her with her initial police interview, the State could have rehabilitated her with her preliminary hearing testimony. In short, we are not persuaded that trial counsel performed deficiently by not impeaching the girl on this one issue, or that trial counsel's performance prejudiced Lee-Kendrick.

¶24 In addition to arguing that the individual alleged deficiencies of trial counsel prejudiced Lee-Kendrick, Lee-Kendrick argued in his postconviction motion that "the cumulative effect of all the mistakes" demonstrates prejudice. We are not convinced that Lee-Kendrick suffered constitutional prejudice from the combination of the alleged deficiencies.

¶25 Because the record conclusively demonstrated that Lee-Kendrick was not prejudiced by trial counsel's alleged errors concerning his cross-examination of the two girls, it was within the postconviction court's discretion

whether to grant Lee-Kendrick a hearing on this issue. We conclude the postconviction court did not erroneously exercise its discretion when it chose to deny the postconviction motion without a hearing. *See* ***Howell***, 301 Wis. 2d 350, ¶79.

II. Postconviction motion for resentencing.

¶26 Lee-Kendrick moved for resentencing on grounds that the trial court based the sentences on inaccurate information concerning whether Lee-Kendrick was advised to stay at a hotel while the police investigated his case. The information at issue was introduced by Lee-Kendrick at trial, when the State asked Lee-Kendrick questions about his reaction to learning that the police were investigating him and whether he arranged for items to be removed from his home while the police conducted their investigation. Lee-Kendrick testified that during the time when he learned that police had gone to his home and when he turned himself in, he was staying "[p]robably at a hotel."

¶27 On redirect examination, Lee-Kendrick provided further information about his decision to stay away from his home while the police investigated:

> Well, my attorney first told me, [t]he police don't have no reason for you—They probably searched the house or stay away from—You stay out of the way. I'll contact you if a warrant come[s] or what's going on, but right now you don't need to be questioned. He said he sent something to them that he obtained [sic] me, see if they wanted to meet in the morning. Yeah, the morning that he displayed all this stuff on the TV. The next morning a warrant was out for my arrest, and I turned myself in.

¶28 When the trial court sentenced Lee-Kendrick, it spoke about Lee-Kendrick's testimony at trial, which it considered to be untruthful. The trial court said:

> [F]or you to get on the witness stand and lie and perjure yourself is unbelievable, those three girls were very believable to the jury. And for you to come up with this cock and bull story that [two girls] … were upset with you because you disciplined them … by taking away their cellphones when they were in trouble or restricting their privileges; and therefore, they invented this against you and somehow convinced their friend [who was assaulted once] to go along with it. Absurd.
>
> And when I was taking notes during the trial, that is exactly what I wrote down in big, bold letters, absurd. Then after you are accused of this thing, do you do what any innocent man would do? Do you go to the police and righteously deny this and show indignation? My God, I didn't do this, these kids are lying. No, you stay at large for almost a month, hiding in some hotel.
>
> And for you to say some lawyer advised you to do it is absolutely ridiculous. Any lawyer that would advise you to do that, frankly, doesn't deserve his ticket to practice law; and I categorically reject the fact that a lawyer told you to stay at large and hide from the police.

¶29 In his motion for resentencing, Lee-Kendrick alleged that the attorney he retained to represent him told him to "stay in a hotel until an arrest warrant was issued for him." In an affidavit accompanying the motion, Lee-Kendrick stated that the attorney told Lee-Kendrick "to stay away from my home and to keep in contact with him." The motion asserted that postconviction counsel had made numerous efforts to contact Lee-Kendrick's first attorney so that he could confirm Lee-Kendrick's assertions, but the attorney had not responded and would have to be subpoenaed.

¶30 The postconviction court denied the motion without a hearing, stating: "[T]he defendant's whereabouts was not a weighty consideration in the sentence that [the trial court] ultimately imposed. Rather, [the] … sentence was based on more important factors, such as the number of victims, the young age of

the victims, the relationship the defendant had with the victims, and the many times he used them in order to satisfy his sexual desires."

¶31 We begin our analysis with the applicable legal standards. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews *de novo*." ***Id.*** (italics added). ***Tiepelman*** explained:

> "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless.

Id., ¶26 (citations omitted). "'An error is harmless if there is no reasonable probability that it contributed to the outcome.'" ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (citation omitted); *see also* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶32 Applying those standards here, we conclude that Lee-Kendrick is not entitled to relief. First, Lee-Kendrick has not shown that his attorney told him "to stay at large and hide from the police," which is the fact the trial court determined was untrue. Lee-Kendrick did not provide an affidavit from his trial counsel,[7] and even his own affidavit does not state that his attorney told him to "hide from the

[7] We recognize that postconviction counsel indicated that she tried to contact trial counsel numerous times without success and that he would need to be subpoenaed to testify.

police." Therefore, Lee-Kendrick has not shown that the information mentioned by the trial court was inaccurate.

¶33 Second, even if we were to accept Lee-Kendrick's affidavit as sufficient proof of what his attorney told him and conclude that the trial court had incorrect information, we conclude that Lee-Kendrick has not established actual reliance. The test for actual reliance is "whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Tiepelman***, 291 Wis. 2d 179, ¶14 (citation omitted). Lee-Kendrick must show the trial court's actual reliance by clear and convincing evidence. *See* ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409. To satisfy this standard, Lee-Kendrick must "provide evidence indicating that it is 'highly probable or reasonably certain' that the circuit court actually relied" on inaccurate information. *See* ***id.***, ¶35 (citation omitted).

¶34 In support of his argument that the trial court relied on inaccurate information, Lee-Kendrick's motion for resentencing simply quoted the trial court's statement noted above and stated: "Clearly, the sentencing court relied on its belief that the claim that an attorney told Mr. Lee-Kendrick to not turn himself in right away was false. The statements by the sentencing court show by clear and convincing evidence that the court relied upon this information." We are not persuaded.

¶35 Our review of the sentencing transcript reveals that the trial court's comments regarding Lee-Kendrick's decision to "hide" while the police conducted their investigation was merely a comment on what the trial court believed was a pattern of untruths in Lee-Kendrick's testimony. The fact that a court may mention an inaccurate piece of information during the totality of its sentencing

remarks does not lead to the conclusion that the court actually relied upon that information in imposing sentence. *See* ***State v. Lechner***, 217 Wis. 2d 392, 421-22, 576 N.W.2d 912 (1998). A closer examination of the entire sentencing transcript reveals that the facts the trial court actually relied on in imposing sentence were: Lee-Kendrick abused two of the girls for a three-year period; Lee-Kendrick let the girl visiting his home drink alcohol the night he assaulted her; Lee-Kendrick offered an "absurd" reason why the girls would fabricate their reports of sexual assault; Lee-Kendrick had shown no remorse; and there was evidence that while the investigation was pending, Lee-Kendrick had friends and relatives "go into the mansion in River Hills and take and destroy and hide stuff."

¶36 Finally, even if we were to conclude that Lee-Kendrick satisfied the two-pronged ***Tiepelman*** test and the burden shifted to the State to prove the error was harmless, we conclude that the State has met that burden. The State asserts:

> The record of the sentencing hearing demonstrates that [the trial court] would have imposed the same sentence even if it was true that counsel advised Lee-Kendrick to avoid arrest by hiding out in a hotel. A review of the court's sentencing comments demonstrates that, while the court did not believe Lee-Kendrick's account that an attorney told him to remain in hiding, this was not a factor of consequence in the sentences that were imposed….
>
> … It is clear beyond a reasonable doubt the sentence would have been the same had the court believed that counsel had advised Lee-Kendrick to avoid arrest by hiding out away from his residence in a hotel.

We agree with the State's analysis. The trial court's sentencing comments focused on the crimes committed and Lee-Kendrick's lack of remorse. There is no "'reasonable probability'" that the trial court's disbelief of Lee-Kendrick's story that his attorney told him to hide out in a hotel contributed to the ultimate

sentences imposed in this case. *See* ***Payette***, 313 Wis. 2d 39, ¶46 (citation omitted).

¶37 We conclude Lee-Kendrick has not shown that the information was inaccurate or that the trial court relied on it. Further, even if we were to assume that Lee-Kendrick met his burden under ***Tiepelman***, the State has shown that the error was harmless. Therefore, we affirm the order denying Lee-Kendrick's motion for resentencing.

By the Court.—Judgment and order affirmed.

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