COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3151

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT M. MAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Robert M. May has appealed from an order denying his motion for postconviction relief from judgments convicting him of second-degree sexual assault and kidnapping. He sought postconviction relief pursuant to § 974.06, STATS. After hearing arguments from both parties, the trial

court denied the motion without holding an evidentiary hearing. May contends that he was entitled to an evidentiary hearing or, alternatively, that this court should grant him relief from judgment in the interest of justice pursuant to § 752.35, STATS. We reject May's arguments and affirm the trial court's order.

¶2 To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***id.*** The appropriate measure of attorney performance is reasonableness, considering all the circumstances. *See* ***State v. Brooks***, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985).

¶3 Even if deficient performance is found, a judgment will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *See* ***id.*** The defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***id.*** at 129, 449 N.W.2d at 848. A reasonable probability constitutes a probability sufficient to undermine confidence in the outcome. *See* ***id.*** However, we need not address the prejudice prong of the test if deficient performance is not shown. *See* ***id.*** at 128, 449 N.W.2d at 848.

¶4 A trial court, in the exercise of its discretion, may deny a postconviction motion alleging ineffective assistance without holding an

evidentiary hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact, presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). The trial court must first determine whether the motion on its face alleges facts which, if true, would entitle the defendant to relief. *See* ***id.*** at 310, 548 N.W.2d at 53. If it does, the trial court must hold an evidentiary hearing. *See* ***id.*** If it does not, the trial court has the discretion to deny the motion without an evidentiary hearing. *See* ***id.*** at 310-11, 548 N.W.2d at 53.

¶5 The trial court denied May's motion without holding an evidentiary hearing after determining that May's arguments were all either factually incorrect, conclusory or conclusively refuted by the record and law. Whether a postconviction motion alleges facts which, if true, would entitle a defendant to relief is a question of law which we review de novo. *See* ***id.*** at 310, 548 N.W.2d at 53.

¶6 We will address seriatim the bases set forth by May to support his claim of ineffective assistance of counsel. May's first argument is that his trial counsel rendered ineffective assistance when he stipulated to the admissibility of statements May made to the police. However, as discussed by the trial court, a portion of May's statement to the police was suppressed rather than admitted by stipulation, and a portion was admitted by the trial court over trial counsel's objection. While trial counsel also stipulated to the admission of a portion of May's statement, nothing in May's postconviction motion discusses the substance of that statement or why it was inadmissible, or provides a basis to conclude that the statement would have been excluded but for counsel's stipulation. May's contention that counsel rendered deficient and prejudicial performance by

stipulating to its admission is purely conclusory and provides no basis for ordering an evidentiary hearing.

¶7 May's second argument is that trial counsel provided deficient representation when he stipulated that a 911 tape could be admitted as an excited utterance. However, he nowhere demonstrates or argues that the statement on the tape was not an excited utterance or that the tape was otherwise inadmissible. Again, because his argument was purely conclusory, the trial court was not required to hold an evidentiary hearing on it.

¶8 May's third argument is that trial counsel provided ineffective assistance when he failed to object to a statement made by the prosecutor during his opening argument, indicating that a DNA test corroborated the claim that May committed the charged sexual assault. However, May's motion and argument do not indicate what objection he believes should have been made by trial counsel to this statement, nor is it entirely clear to this court what objection allegedly should have been made.[1] Because May's motion did not allege facts demonstrating that the prosecutor misstated the evidence in his opening statement or set forth any other basis for an objection by trial counsel, the trial court properly refused to grant an evidentiary hearing on this issue. Moreover, the DNA testimony was

[1] The prosecutor used the word "corroborate" and indicated that the person who did the DNA testing was going to testify that one of the markers found on May's underwear was a type found in the blood of the victim, but not in the blood of May or his wife. However, in his opening argument the prosecutor also carefully discussed the limitations of the two types of DNA testing performed in this case and pointed out that the person who did the DNA testing was unable to identify any one person as the source of the blood found on May's underwear.

We have reviewed the testimony of the person who performed the DNA testing. She indicated that one marker in the sample she tested had to have come from someone other than May or his wife and was a type of marker found in the victim's DNA. We therefore cannot conclude that the prosecutor misrepresented her testimony in his opening argument.

offered by May. In both his examination of the person who performed the testing and his opening argument, May's counsel emphasized the inconclusiveness of the DNA testing. No basis therefore exists in the record to conclude that counsel's failure to object to the opening argument prejudiced May and deprived him of a trial whose result is reliable.

¶9 May's fourth argument is that his trial counsel rendered ineffective assistance when he failed to adequately investigate the age of the bruises which the victim allegedly suffered as a result of the sexual assault and to present expert testimony on that subject. However, a defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). The defendant must base a challenge to counsel's representation on more than mere speculation. *See* ***id.*** at 48, 527 N.W.2d at 350.

¶10 May's postconviction motion sets forth no expert opinion or evidence which would support a conclusion that the victim's bruises did not result from the assault or that they existed prior to the assault. Moreover, to the extent he is arguing that trial counsel was deficient because he did not seek an independent medical examination of the victim to assess the age of the bruises, his motion sets forth no legal authority demonstrating that he was entitled to compel the victim to submit to a medical examination, nor any basis to conclude that the trial court would have ordered an examination if trial counsel had requested it. He therefore failed to provide a basis for the trial court to conclude that counsel rendered deficient or prejudicial performance by failing to obtain either a medical examination of the victim or expert review of photos of her bruises.

¶11 May next objects to trial counsel's failure to present expert testimony to rebut the testimony of the emergency room physician who examined the victim after the assault. Based upon his prior experience of examining approximately 150 adult female sexual assault victims, he testified that the victim's demeanor during his examination was consistent with behavioral characteristics of other sexual assault victims.

¶12 In his postconviction motion, May relied on the affidavit of Dr. Nancy Perry, a therapist who specializes in the treatment of sexual assault victims. However, in her affidavit, Perry conceded that she could not directly refute the emergency room physician's opinion or testify that the victim's demeanor during the examination was inconsistent with that of sexual assault victims. She merely indicated that she could have assisted defense counsel during cross-examination by providing information regarding additional characteristics of sexual assault victims which were not exhibited by the victim. She also indicated that her testimony would have provided a more comprehensive explanation of how to recognize the behavioral characteristics of sexual assault victims, and that she could have challenged the sufficiency of the examination by the emergency room physician.

¶13 As with the proposed expert testimony regarding the victim's bruises, it would be purely speculative to assume that Perry's testimony or assistance would have aided May or affected the outcome of the case. Perry acknowledged that she could not directly refute the emergency room physician's testimony and stated that she would not provide direct testimony indicating that sexual assault victims exhibited other characteristics which were not exhibited by the victim in this case. At best, May is speculating that information Perry could have provided to trial counsel or the jury would have weakened the value of the

physician's testimony. However, because her testimony would not have directly rebutted the physician's testimony, and because we cannot reasonably conclude that a more detailed discussion of analyzing and identifying the characteristics of sexual assault victims would have had a material impact on the case, it would be purely speculative to conclude that trial counsel was deficient for failing to solicit additional expert testimony or advice on this subject, or that his failure to do so affected the outcome of the case.

¶14 May's next arguments relate to the prosecutor's closing argument.[2] He contends that the prosecutor improperly commented on May's pretrial silence when he said, "That's why there are jury trials because defendants don't admit committing crimes." He contends that his trial counsel should have objected to this statement, as well as to the prosecutor's statement that:

> You were thinking about who had an opportunity to lie, and you were probably thinking that with the defendant testifying now and the first time giving his story, what eighteen months later? … I guess that's about fifteen. He has had fifteen months to consider what kind of lie to tell you.

[2] This court has searched the record thoroughly and has not located the transcript of the closing arguments held in this case. The record does indicate that closing arguments were given on December 21, 1994. However, the only transcript in the record from the December 21, 1994 trial date ends with the trial court giving jury instructions at the conclusion of the evidence. After doing so, the trial court stated that closing arguments would be made after the lunch break. However, the record contains no continuation of the proceeding.

The responsibility for the composition of the appellate record lies with the parties. *See* ***Mercury Records v. Economic Consultants, Inc.***, 91 Wis.2d 482, 506, 283 N.W.2d 613, 625 (Ct. App. 1979). As a general rule, when an appellate record is incomplete in connection with an issue raised by the appellant, we will assume that the missing material supports the trial court's ruling. *See* ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993). However, because the challenged portions of the closing argument are quoted in the postconviction motion contained in the record, we will address May's argument.

¶15 Assuming arguendo that May's trial counsel should have objected to these statements as infringing upon May's right to pretrial silence, nothing in his postconviction motion or the record provides a basis for concluding that counsel's failure to do so deprived May of a trial whose result was reliable. Absent such a showing, the trial court was entitled to reject these claims without holding an evidentiary hearing.

¶16 May also contends that his trial counsel should have objected when the prosecutor expressed his personal opinion when discussing the testimony of May's wife, stating: "It isn't what you would expect Lore May to be doing given what you know. I think a lot of women would not be supportive of their husbands under these circumstances. A lot of women, probably most women, would not be."

¶17 A prosecutor may give a personal opinion based on the evidence, provided it is limited to the evidence actually adduced at trial. *See* ***State v. Cydzik***, 60 Wis.2d 683, 694-95, 211 N.W.2d 421, 428 (1973). The prosecutor may comment on the evidence and argue from it that the evidence convinces him or her of the defendant's guilt and should convince the jury. *See* ***id.*** at 694 n.24, 211 N.W.2d at 428. The prosecutor kept within the confines of these limitations when he expressed surprise at the supportive testimony of May's wife.

¶18 The last basis set forth by May for his ineffective assistance of counsel claim is that trial counsel should have moved for a directed verdict on the sexual assault and kidnapping charges at the close of the State's case. In effect, he contends that the charges should have been dismissed because the evidence was insufficient to find him guilty of the charges beyond a reasonable doubt.

¶19 Counsel did not render ineffective assistance by failing to make a motion to dismiss because such a motion would have been meritless. A motion to dismiss at the close of the State's case may be granted only when, considering the evidence in the light most favorable to the State, the evidence adduced, believed and rationally considered is insufficient to prove the defendant's guilt beyond a reasonable doubt. *See* ***State v. Dahlk***, 111 Wis.2d 287, 304-05, 330 N.W.2d 611, 620 (Ct. App. 1983).

¶20 Evidence in this case included testimony by the victim indicating that May, who was known to her before the assault, entered her house while she was sleeping, physically restrained her from leaving the house and had sexual intercourse with her, all without her consent. Although she did not identify May in her 911 call to the police, she identified him by name and physical description when the police arrived at her home. May was apprehended while driving from the victim's home to his own home and acknowledged having been at her house. While evidence indicated that the DNA test results were inconclusive, testimony by a serologist from the State Crime Lab indicated that typing of the blood found on May's underwear matched the victim's blood type, but not his blood type or that of his wife. Under these circumstances, no basis would have existed to dismiss the State's case. It is not ineffective assistance to fail to bring a motion which would have failed. *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).

¶21 May's final contention is that this court should reverse the trial court's order in the interest of justice pursuant to § 752.35, STATS. However, this court may exercise its power of discretionary reversal only in direct appeals from judgments or orders. *See* ***State v. Allen***, 159 Wis.2d 53, 55, 464 N.W.2d 426, 427 (Ct. App. 1990). Relief may not be granted pursuant to § 752.35 when, as here, an

appeal is taken from an order denying collateral relief from a judgment of conviction pursuant to § 974.06, STATS. *See* ***Allen***, 159 Wis.2d at 55-56, 464 N.W.2d at 427.

By the Court.—Order affirmed.

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