

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2016AP116-CR

STATE OF WISCONSIN

Cir. Ct. No. 2010CF005050

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDY ALLEN LAPP,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. Randy Allen Lapp appeals a judgment of the circuit court, following a jury trial, of one count of battery, one count of substantial

battery with intent to cause bodily harm, and one count of victim intimidation. He also appeals the order denying his postconviction motion for relief.¹ We affirm.

BACKGROUND

¶2 On October 15, 2010, Lapp was charged with misdemeanor battery, substantial battery with intent to cause great bodily harm, strangulation and suffocation, and felony intimidation of a victim, all as acts of domestic abuse. An Amended Information added the “repeater” penalty enhancer to all of the charges. According to the charging documents, the charges stemmed from an incident that occurred on October 12, 2010, in which Lapp had a physical altercation with his live-in girlfriend, D.Y. According to the complaint, on the afternoon of October 12, 2010, Lapp had an argument with D.Y., during which he pushed her head into a pillow, “back-slapped” her on the neck, and struck her in the chest with a closed fist. D.Y. told police that Lapp then left the residence, but returned later and kned her in the chest; choked her; threatened to kill her; head-butted her, causing a nasal fracture and concussion; held a knife to her; and called her a “rat” for calling the police. D.Y. was able to get the attention of a neighbor, who called the police.

¶3 The matter proceeded to a jury trial where Lapp was acquitted of the strangulation/suffocation charge, but was convicted of the remaining charges. Lapp filed a postconviction motion for relief, arguing that he was entitled to a new trial based on multiple claims of ineffective assistance of counsel. The postconviction court denied the motion without a hearing. This appeal follows.

¹ The Honorable Mel Flanagan entered the judgment of conviction. The Honorable Jeffrey Wagner entered the order denying Lapp’s postconviction motion.

We will set forth additional facts relevant to each of the issues raised on appeal as necessary in our discussion below.

DISCUSSION

¶4 On appeal, Lapp alleges that defense counsel was ineffective for: (1) failing to file for substitution of judge despite Lapp’s request; (2) improperly arguing or preserving an “other acts” motion; (3) failing to object to unnecessary security during trial and failing to request a curative jury instruction; (4) failing to seek preclusion of the State’s use of evidence of flight; (5) failing to object to testimony and pictures of a knife with a camouflage-colored handle based on lack of proper foundation; (6) failing to properly prepare exhibits to display to the jury; (7) failing to object to prejudicial analogies used by a State’s witness during her testimony; (8) telling the jury during closing arguments that it should find Lapp guilty; and (9) failing to object to the State’s “vouching” for the victim during closing arguments. Lapp also argues that the cumulative effect of counsel’s deficiencies prejudiced his defense.

Standard of Review

¶5 The following standards govern claims of ineffective assistance of counsel:

To state a claim for ineffective assistance of counsel, the defendant must demonstrate: (1) that his counsel’s performance was deficient; and (2) that the deficient performance was prejudicial.

To prove deficiency, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” The defendant must overcome the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”

To prove prejudice, the defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” The prejudice inquiry asks 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.”

State v. Romero–Georgana, 2014 WI 83, ¶¶39-41, 360 Wis. 2d 522, 849 N.W.2d 668 (quoted sources and internal citations omitted).

¶6 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *State v. Allen*, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that the defendant is not entitled to relief. *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the “who, what, where, when, why, and how” with sufficient particularity for the court to meaningfully assess the claim. *Allen*, 274 Wis. 2d 568, ¶23.

¶7 We review a postconviction court’s decision to deny a postconviction motion without an evidentiary hearing under the *de novo* standard, independently determining whether the facts alleged, if true, would establish the denial of a constitutional right. See *State v. Bentley*, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996). As part of that review, we will independently determine

whether the record demonstrates that Lapp's claims are procedurally barred. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

A. Failing to File for Substitution of Judge

¶8 Lapp contends that defense counsel was ineffective for failing to file for judicial substitution following judicial rotations when Judge Mel Flanagan began presiding over the case. Lapp contends that he asked counsel to file for substitution because he had previously been sentenced by Judge Flanagan and was uncomfortable with her presiding over his trial, but that counsel failed to do so. The postconviction court rejected Lapp's argument, finding that Lapp failed to show how the lack of substitution resulted in an unfair trial. We agree.

¶9 To raise a successful claim of ineffective assistance of counsel based on counsel's failure to file a request for substitution of judge, a defendant must allege prejudice. *See State v. Damaske*, 212 Wis. 2d 169, 198, 567 N.W.2d 905 (Ct. App. 1997). Lapp's motion does nothing more than assert that had counsel filed for substitution, Judge Flanagan would not have presided over his trial. The motion does not allege any facts connecting counsel's failure to file a request for judicial substitution to any conduct by the judge that caused an unfair trial.

B. *McMorris* Motion

¶10 Prior to trial, defense counsel filed a motion to admit "other acts" evidence asserting that D.Y. carried a knife and that Lapp had seen the knife in D.Y.'s purse on multiple occasions. The motion also alleged that Lapp head-butted D.Y. only after he saw D.Y. reach into her purse to grab a knife. Lapp asserted that the evidence was relevant to his state of mind at the time of the

incident and was admissible as evidence of D.Y.'s habit under *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973), which held:

When the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his [the defendant's] knowledge at the time of the incident.

Id. at 152.

¶11 The trial court rejected the motion, noting that D.Y., a painter, carried a painter's knife and that Lapp knew D.Y. carried a painter's knife given her profession. The court found that Lapp did not show that he was aware of D.Y. using the knife for anything other than her profession.

¶12 In his postconviction motion, Lapp argued that defense counsel mishandled the motion. Lapp asserted that he told defense counsel about four specific incidents "involving both the alleged victim and violent behavior" that counsel failed to discuss when he filed the *McMorris* motion. The four incidents were that: (1) when Lapp once asked D.Y. why she carried a knife in her purse, she responded "for cutting a motherfucker's balls off" and told Lapp that she would not allow a man to hit her ever again; (2) when Lapp asked D.Y. why she left a man in Pennsylvania and left behind her personal items, D.Y. told Lapp that she left because "[i]t got violent"; (3) D.Y. verbally abused her young son; and (4) D.Y. told Lapp that she was worried that an ex-boyfriend who was recently released from prison might stalk her and beat her because she had some of his property. Lapp contends that if counsel included that information in the *McMorris* motion, the trial court would have "had sufficient information to grant

an evidentiary hearing at which it would be determined whether any of the [omitted] information could be presented in conjunction with Mr. Lapp’s self-defense argument.”

¶13 We agree with the postconviction court that “nothing about the facts in any of these scenarios show the victim was physically violent, responded with physical violence with a knife, or that she was the violent one.” (Emphasis omitted.) Indeed, three of the four instances show that D.Y. was prepared to defend herself against violence, rather than incite it. D.Y.’s alleged verbal abuse of her son is irrelevant to whether she carried a knife. The postconviction court noted that even if defense counsel had presented these four instances in his motion, the trial court still would have rejected the motion for failing to constitute *McMorris* evidence. Accordingly, defense counsel cannot be found ineffective for failing to file a *McMorris* motion on the issues Lapp specified.

C. Failing to Object to Security

¶14 Lapp next argues that his defense counsel was ineffective for failing to object to the presence of “conspicuous and armed security bailiffs [who] were positioned around Mr. Lapp at key moments and within full view of the jury.” Lapp also argues that counsel was ineffective for failing to request WIS JI—CRIMINAL 314 (“Defendant Wearing a Visible Restraining Device in the Presence of Jurors”) as a curative instruction. Lapp contends that the presence of “four armed men” was inherently prejudicial because it gave the jury the impression that Lapp was violent or a flight risk.

¶15 Again, we agree with the postconviction court that Lapp’s arguments are completely speculative. Lapp does not allege that the jury saw any of his

restraints,² nor does he present any evidence that the presence of armed security prejudiced his defense. Indeed, the jury acquitted Lapp of one the charges, which suggests that the presence of the “unnecessary security” was not prejudicial to his defense. Accordingly, counsel was not ineffective for failing to object to the presence of “armed security bailiffs” and for failing to request a jury instruction calling attention to the security measures that Lapp objects to now.

D. Evidence of Flight

¶16 During trial, Lapp sought to suppress evidence of the existence of a bench warrant based on Lapp’s failure to pay child support. The trial court granted the motion. The State later argued that Lapp fled the residence after his altercation with D.Y. and that Lapp’s flight was evidence of guilt. Postconviction, Lapp argued that counsel was ineffective for failing to suppress *all* evidence of flight, claiming the real reason Lapp fled after the altercation with D.Y. was the existence of the child support bench warrant. He argued that the State improperly used his failure to wait for police or to call the police himself as evidence of guilt because the parties knew “that Mr. Lapp had a valid reason for not involving the police.” The postconviction court rejected Lapp’s argument, stating “[a]ny attempt to preclude the State’s use of the defendant’s flight from the scene as evidence of guilt in a motion *in limine* or an objection at trial would have been denied” because the “State’s interpretation of the evidence was fair game.” We agree. Lapp cannot use his success in blocking the State’s use of the bench warrant to preclude other explanations for his flight.

² Lapp’s restraints were leg shackles. Lapp does not allege that the jury actually saw the shackles, and the postconviction court noted that the shackles were hidden from the jury.

¶17 Moreover, Lapp has not shown that he was prejudiced by the evidence of flight. Multiple witnesses testified about the violent incident between Lapp and D.Y. D.Y. testified in great detail, describing how Lapp was drunk, struck her numerous times, and head-butted her. Dr. Gregory Rickburg, the emergency room physician who treated D.Y., testified in detail about the injuries D.Y. sustained and noted that they were consistent with domestic violence. Richard Beebe, Lapp's and D.Y.'s neighbor, testified that on the morning of October 12, 2010, he woke up to screaming coming from within his apartment complex. Beebe stated that he heard D.Y. screaming for help and that he found D.Y. "laying in the fetal position inside her back door." Beebe also stated that D.Y. was holding a towel that was "full of blood" to her face. Thus, even if the evidence of flight had been precluded, it is unlikely that the result of Lapp's trial would have been different.

E. Failure to object to testimony about, and pictures of, a camouflage-colored knife

¶18 Lapp argues that "[d]efense counsel failed to object when the [S]tate improperly introduced photo evidence of a camouflage-colored knife after the Court ruled, prior to trial, that the photo would only be introduced if there was 'some reason to connect it to this trial.'"

¶19 Prior to trial, defense counsel asked the court to exclude a photograph of a camouflage-colored knife taken from D.Y.'s apartment on the grounds that D.Y. told police that Lapp threatened her with a black knife. The State told the court that the police report initially noted that the knife was not located, but then the knife "showed up in the photos" and was positively identified

by D.Y. as the knife Lapp threatened her with. The trial court ruled if the State “can connect up the knife in the photos by some witness, then they can use it.”

¶20 During opening statements, the State told the jury that there were two knives at issue: “You’ll see a photograph of one of the two knives that are – that [D.Y.] will tell you is—she’s not sure which knife it is, but she’ll tell you that it’s a—that’s a knife like it, because there’s two of them, and that it could be the knife.” Defense counsel did not object. During the State’s direct examination of D.Y., the State showed D.Y. the photograph of the camouflage-colored knife and asked whether Lapp used that particular knife to threaten her. D.Y. responded in the affirmative, but also noted that Lapp had two very similar knives. She “believe[d]” the camouflage-colored knife was the one Lapp used on her because she recalled Lapp grabbing a knife from the top of their television and the camouflage-colored knife was in that location. Defense counsel did not object.

¶21 There was a proper foundation linking the camouflage-colored knife to the offense. The trial court ruled that the evidence was admissible if the State could “connect up the knife in the photos by some witness.” The State did just that. On the morning of trial, D.Y. told the State that the camouflage-colored knife was the knife Lapp threatened her with, prompting the court to allow the photographic evidence. During trial, D.Y. told the jury that Lapp had two knives, but she “believe[d]” the camouflage-colored knife was the one because of its location in their apartment. D.Y. connected the knife to the offense through her testimony. There was nothing for defense counsel to object to. Accordingly, counsel was not ineffective.

F. Failing to Prepare Proper Exhibits

¶22 Next, Lapp contends that defense counsel was ineffective for failing to prepare a professionally-drawn diagram showing the physical layout of the apartment. Lapp has failed to show how the lack of a professionally-drawn diagram prejudiced his defense. In light of the detailed testimony describing D.Y.’s injuries and the manner in which those injuries were caused, Lapp’s contention that professionally-prepared visual aids would have helped his defense is pure speculation. Counsel was not ineffective for failing to prepare better diagrams.

G. Failing to Object to Prejudicial Analogies by a State’s Witness

¶23 Lapp contends that defense counsel was ineffective for failing to object to Beebe’s description of how D.Y. looked just after the incident. Beebe said that D.Y. “looked like a dog that had been beaten with a stick for hours.” Lapp argues that the analogy was a “gory and disturbing image,” which the State later repeated in closing arguments. Lapp contends that the image “remain[ed] in the minds of the jury.” The State introduced multiple photographic images of D.Y.’s injuries. Multiple witnesses testified about, and described, the injuries. The jury had abundant evidence on which to make its own determination about the severity of D.Y.’s injuries. Lapp cannot show that but for Beebe’s description, the result of his trial would have been different. Hence, Lapp was not prejudiced by Beebe’s testimony.

H. Defense Counsel’s Misstatement During Closing Arguments

¶24 During closing arguments, defense counsel concluded his argument by stating: “Return a verdict of guilty—I’m sorry. Return a verdict of not guilty

to all the charges in this case.” Lapp argues that the portion of this statement asking for “a verdict of guilty” was prejudicial to his defense because it “could be seen by a Jury as a functional equivalent to a guilty plea.” Lapp’s argument makes little sense. Defense counsel’s misstatement was obviously an error and was instantly corrected. It is highly unlikely that a jury, which heard defense counsel spend the entire trial defending Lapp, would conclude on the basis of an obvious misstatement that defense counsel really wanted the jury to find his client guilty. The jury acquitted Lapp of one of the charges, which indicates that counsel’s slip of the tongue really had little, if any, effect on the jury. Any potential prejudice based on counsel’s misstatement is the epitome of speculation.

I. Failing to Object to the State’s Vouching for the Credibility of the Victim

¶25 Finally, Lapp contends that defense counsel was ineffective for failing to object to the following portion of the State’s closing argument, which came after the State summarized D.Y.’s testimony:

That’s [D.Y.’s] testimony. You heard from the court that you can find her believable and credible and find the defendant guilty of all those charges, just based upon that[.]

¶26 Lapp argues that the State “removed the question of [D.Y.’s] credibility from the Jury’s consideration and improperly instructed the Jury that the court itself had seemingly approved of the Jury finding D.Y. credible.” We disagree. That is not what the State said and is contrary to the instruction given by the trial court.

¶27 The State’s comment did not remove the question of D.Y.’s credibility from the jury’s consideration; to the contrary, it reiterated the trial

court's instruction that the jury was to "decide the case solely on the evidence offered and received at trial." The State recapped D.Y.'s testimony but *did not* tell the jury to find D.Y. credible. The State simply reminded the jury that it was responsible for credibility determinations and could decide the case based on those determinations. "[O]nce the jury has been properly instructed on the principles it must apply to find the defendant guilty beyond a reasonable doubt, a court must assume on appeal that the jury has abided by those instructions." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Accordingly, counsel was not ineffective for failing to object to the State's argument.

¶28 Because Lapp has not shown that any of defense counsel's alleged errors prejudiced his defense, there is no basis for us to conclude that the cumulative effect of any of counsel's alleged errors prejudiced Lapp's trial. For the foregoing reasons, we affirm the trial court.

By the Court.— Judgment and order affirmed.

Not recommended for publication in the official reports.

