COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2605-CR **Cir. Ct. No. 2012CF4861**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. JOHNSON, A/K/A DAVID ALI SHABAZZ,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. David L. Johnson appeals a judgment of conviction of one count of aggravated battery and one count of false imprisonment following a jury trial. He also appeals the order denying his motion for postconviction relief

in which he claimed ineffective assistance of counsel and alleged multiple sentencing errors. We affirm.[1]

BACKGROUND

¶2 On October 2, 2012, Johnson was charged with one count of first-degree sexual assault with the use of a dangerous weapon, one count of aggravated battery, one count of false imprisonment, and one count of strangulation and suffocation. According to the criminal complaint, on September 28, 2012, K.M. met Johnson and agreed to help him move out of his apartment. K.M. went to Johnson's apartment and cooked for him. Shortly thereafter, Johnson attempted to kiss K.M., but K.M. rebuffed his advances. Johnson then became violent. Johnson struck K.M. multiple times, armed himself with a knife and threatened K.M. with it. He also ordered K.M. to perform oral sex and strangled her with his belt. The complaint further alleged that Johnson continued to beat K.M., forced sexual intercourse, and then let K.M. leave. K.M. went home to her husband, who then attempted to confront Johnson. K.M. also went to the hospital with visible bruises and bleeding. She was diagnosed with broken ribs and a nasal fracture. A police search of Johnson's apartment led to the recovery of some of K.M.'s possessions, a knife, and the belt K.M. alleged was used to strangle her. Johnson was subsequently arrested and charged.

¶3 The matter proceeded to trial. K.M. testified that she met Johnson at a CVS Pharmacy on September 24, 2012. At Johnson's request, she agreed to help Johnson clean and pack his apartment because he was moving. K.M. stated that on the evening of September 27, 2012, Johnson picked her up and drove her

[1] The Honorable David L. Borowski entered the judgment of conviction. The Honorable M. Joseph Donald entered the order denying Johnson's postconviction motion.

to his apartment. K.M. admitted to drinking alcohol and smoking crack cocaine at Johnson's apartment while cooking dinner for him. K.M. stated that after she cooked, Johnson's "mood had changed and the next thing I knew I was being drug to the bedroom." K.M. testified that Johnson had retrieved a knife and "just kept hitting me." She further stated that Johnson threatened to kill her. K.M. attempted to escape, but Johnson pulled her back.

¶4 K.M. also told the jury that Johnson sexually assaulted her both orally and vaginally, and that he attempted anal sex but was unsuccessful. During the sexual assaults, K.M. said that Johnson strangled her with a belt and hit her until she lost consciousness. K.M. stated that when she regained consciousness, Johnson was sleeping. She put on one of Johnson's shirts, left behind her belongings, and fled Johnson's apartment, running through a cemetery to get home. At home, K.M. told her husband, E.M., about her experiences. Her husband became "very angry, very upset." K.M. went back to Johnson's apartment with E.M., who wanted to confront Johnson. K.M. stated that E.M. continuously rang the doorbell to Johnson's apartment complex "and that's when a lady came down and spoke to [E.M.]" and called 911. E.M. also called 911.

¶5 E.M. testified that when K.M. arrived home early in the morning on September 28, 2012, she "was bloody, black eyes, and falling through the doorway." E.M. stated that K.M. was crying and "[s]cared," prompting E.M. to "[tell] her that we're going back over there to where the incident happened." E.M. admitted to smashing Johnson's car windows with a crowbar out of anger when he arrived at Johnson's apartment complex. E.M. stated that he was angry but did not intend to "handle it myself. Once upon arrival at the address, I did call the police."

¶6 Dorothy Nolden, a tenant at Johnson's apartment complex, testified that early in the morning of September 28, 2012, beginning at around 1:30 a.m. or 2:00 a.m., she heard screaming from within the building that "then carried on through that morning." Nolden initially thought the noise was coming from a cat, but later concluded that the screaming was a woman's voice. Nolden realized that K.M. was the person who had been screaming when E.M. arrived at the apartment building and began banging on the door. E.M. told Nolden that Johnson "raped [his] wife." Nolden called 911.

¶7 Officer Matthew Waldenmeyer testified that he arrived at Johnson's apartment complex on the morning of September 28, 2012, where he encountered E.M. and K.M. outside of the complex. Waldenmeyer stated that K.M. was "sobbing and sitting on a picnic table," was bruised, and had redness and swelling around both eyes. K.M. told Waldenmeyer that Johnson raped her inside the apartment building. Waldenmeyer stated that when he and other officers entered Johnson's apartment, Johnson was naked in his bed.

¶8 Officer Jeffrey Emanuelson testified that Johnson had a dark red substance on his left hand, which was swabbed when Johnson was taken to the hospital. Margaret Cario, a DNA analyst with the Wisconsin State Crime Lab, testified that the substance from Johnson's hand was identified as K.M.'s blood.

¶9 Officer Deb Kranz testified that she interviewed K.M. at the hospital. Kranz stated that K.M. had black eyes, swelling to both eyes, and swelling on her left cheek and mouth. Based on her experience, Kranz stated that the bruising and injuries were consistent with being hit.

¶10 Detective Branko Stojsavljevic testified that he executed a search warrant for Johnson's apartment. Pursuant to the warrant, he collected a crack pipe, K.M.'s jacket, K.M.'s purse, and a black leather belt.

¶11 The defense did not present any witnesses, nor did Johnson testify. During closing arguments, defense counsel focused on the lack of physical evidence and attempted to discredit K.M.'s testimony. Defense counsel called attention to inconsistencies in K.M.'s testimony and the lack of DNA evidence consistent with forced oral sex or intercourse. Defense counsel also noted the lack of evidence consistent with strangulation and faulted the State for not testing for DNA evidence on the bed sheets on which K.M. alleged the assault occurred. Counsel also noted that K.M.'s clothes were not recovered from Johnson's apartment despite K.M.'s claims that she left her clothes behind and fled wearing one of Johnson's shirts.

¶12 The jury convicted Johnson of aggravated battery and false imprisonment, but acquitted him of sexual assault and strangulation.

¶13 At sentencing, defense counsel objected to the entirety of the Presentence Investigation Report (PSI) and pointed out numerous alleged inaccuracies. The court discussed the ***Gallion***[2] factors, starting with Johnson's character, noting that Johnson "has nothing short of an atrocious criminal record," a "history of noncompliance" that is "extensive and basically unabated," and concluded Johnson was "a menace to the community." The court discussed "the enormous amount of harm to the victim," stating that he "broke the ribs of a female, broke a female's nose, gave her a black eye and terrorized and traumatized

[2] *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

that female." The court found Johnson to be "a very high risk to this community." The court referenced the incidents described in the PSI, but stated that it was "giving that very, very little weight." The court sentenced Johnson to two consecutive six-year sentences, the maximum on each charge.

¶14 Johnson filed a postconviction motion, alleging that he was entitled either to a new trial or to an amendment of the judgment of conviction and resentencing. Johnson alleged that his defense counsel was ineffective for failing to present potential exculpatory evidence and for failing to present an adequate defense with regard to the aggravated battery and false imprisonment charges. Specifically, Johnson argued that defense counsel: (1) "did not reference the counts for aggravated battery and false imprisonment during closing arguments"; (2) did not call any of the witnesses on the defense's witness list; (3) did not investigate "John"—a supposed friend of K.M.'s who allegedly planned to rob Johnson and could have been responsible for K.M.'s injuries; and (4) failed to investigate a series of phone calls which would have discredited K.M.'s timeline of events.

¶15 Johnson also argued that the two DNA analysis surcharges imposed were unconstitutional *ex post facto* violations as applied to him because the crimes here occurred before the effective date of WIS. STAT. § 973.046(1r) (2015-16),[3] which imposes a separate DNA surcharge for each felony. He also argued that he was entitled to resentencing because the PSI contained numerous inaccuracies. The postconviction court denied the motion without a hearing. This appeal follows.

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

DISCUSSION

¶16 On appeal, Johnson raises four issues. He contends that: (1) the postconviction court erroneously denied his motion without a ***Machner***[4] hearing because he alleged sufficient material facts based on ineffective assistance of counsel; (2) both DNA analysis surcharges imposed by the sentencing court constitute unconstitutional *ex post facto* violations; (3) he is entitled to resentencing based on inaccuracies in the PSI; and (4) he is entitled to a new trial in the interest of justice. We address each in turn.

Ineffective Assistance of Counsel

¶17 Johnson argues that his postconviction motion alleged sufficient facts to require an evidentiary hearing and that the postconviction court applied the wrong legal standard in denying his motion. Specifically, he contends that the postconviction court failed to assume that Johnson's allegations were true, as it was required to do under ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). We disagree.

¶18 For a defendant to prevail on an ineffective assistance of counsel claim, the two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), must be satisfied. A defendant "must show that counsel's performance was both deficient and prejudicial." ***Bentley***, 201 Wis. 2d at 312. We may dispose of an ineffective assistance of counsel claim if the defendant fails to satisfy either element. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

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

¶19 If a postconviction court denies a motion without a hearing, the question we must answer is whether the postconviction motion alleged facts that, if proven, show that the defendant is entitled to relief on his ineffective assistance of counsel claim. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. Sufficiency of the motion is a question of law which we review *de novo*. *See* ***id.*** If the motion does not raise facts that entitle the defendant to relief, "'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,'" the grant or denial of the motion is a matter of discretion entrusted to the postconviction court. ***Id.*** (citations omitted).

¶20 Johnson's motion alleged that counsel failed to obtain specific phone records and failed to present an adequate defense as to the aggravated battery and false imprisonment counts. Specifically, Johnson argued that prior to trial, he prepared a list of phone calls that he remembered receiving between September 26, 2012, and September 28, 2012, which he gave to defense counsel. According to Johnson, the list of phone calls provided evidence of the existence of "John," who Johnson claims was a friend of K.M. and allegedly picked K.M. up from Johnson's apartment the night she sustained the injuries. At trial, K.M. denied John's existence. According to Johnson's motion, had counsel investigated the phone records, John's existence would have been proven, K.M.'s credibility would have been undermined, and the defense's theory that K.M. sustained the injuries another way, (*i.e.*, from John) would have been supported. Johnson's motion also alleged that phone calls from his friend Jesse McSwain and his ex-wife would have undermined K.M.'s credibility because both called Johnson during the time period K.M. alleged to have been at Johnson's apartment and neither heard K.M. in the background or heard any suspicious activity.

¶21 Contrary to Johnson's contentions, the postconviction court did not deny Johnson's motion based upon an incorrect legal standard. Rather, it denied the motion because Johnson's allegations were unsubstantiated, speculative, and conclusory. Johnson's motion provides very little information about "John," and provides no information that can materially support Johnson's claim that John picked K.M. up from Johnson's apartment. Nor does Johnson's motion show how phone calls from McSwain or Johnson's ex-wife would have bolstered Johnson's defense given the evidence of blood found on Johnson's hand, K.M.'s detailed description of her attack, and her undisputed physical injures. Moreover, Johnson's motion does not show how these phone calls would have undermined K.M.'s credibility because during closing arguments defense counsel pointed to numerous inconsistencies in K.M.'s testimony.

¶22 The alleged phone calls from McSwain and Johnson's ex-wife, which Johnson claims would have established that neither heard K.M. in the background, are nothing more than speculative. Assuming the calls were made and that the calling parties heard nothing in the background, that does not mean that the assault did not happen later. Johnson's motion must allege with specificity what the people who made the calls would have revealed and how that would have altered the outcome of the case. *See* ***State v Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

¶23 Johnson contends that his defense counsel failed to present an adequate defense as to the aggravated battery and false imprisonment charges because counsel failed to call any defense witnesses, namely, "John." We do not know who John is or what he would have testified to at trial. There is no affidavit from John or other evidence that John even exists. Johnson's contention that John's testimony would have bolstered his defense is pure speculation. Johnson

was not entitled to a ***Machner*** hearing based on his speculative assertions. *See* ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999) ("It is not enough for a defendant to merely show that the error 'had some conceivable effect on the outcome' of the trial.... Rather, the defendant must demonstrate ... there is a reasonable probability ... that the result of his trial would have been different.") (quoted source and internal citation omitted).

¶24 Johnson's postconviction pleadings fail to establish a non-speculative claim of ineffective assistance of counsel. Accordingly, the postconviction court properly denied Johnson's motion without a ***Machner*** hearing.

DNA Surcharge

¶25 Johnson also contends that the sentencing court violated *ex post facto* principles, pursuant to ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, when it imposed two DNA surcharges. The postconviction court vacated one of the surcharges; however, Johnson still challenges the remaining surcharge as an *ex post facto* violation.

¶26 We agree that pursuant to ***Radaj***, the imposition of two DNA surcharges constituted an unconstitutional *ex post facto* violation. ***Radaj*** explained that in such cases, the DNA surcharge can still be imposed if the sentencing court applies the prior statute, WIS. STAT. § 973.046(1g) (2011–12), and ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. *See* ***Radaj***, 363 Wis. 2d 633, ¶38. This application requires the sentencing court to exercise its discretion to determine whether to apply the surcharge. ***Id.*** Here, the sentencing court cited multiple reasons for imposing the surcharge beyond the fact that it was mandatory, including deterrence and rehabilitation, stating Johnson

"needs … lots of it." We conclude that the sentencing court properly exercised its discretion.

¶27 The parties also debate the applicability of ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *aff'd*, 2017 WI 15, ___ Wis. 2d ___, ____ N.W.2d ___, which held that the imposition of a single DNA surcharge for certain crimes committed before the effective date of WIS. STAT. § 973.046(1r) does not violate *ex post facto* principles. ***Scruggs***, 365 Wis. 2d 568, ¶19. The Wisconsin Supreme Court recently upheld our decision. *See* ***State v. Scruggs***, 2017 WI 15, ___ Wis. 2d ___, ____ N.W.2d ___. Because only one DNA surcharge is at issue in this appeal, we conclude that neither ***Radaj*** nor ***Scruggs*** provides a basis to overturn the postconviction order leaving in place a single DNA surcharge.

The PSI

¶28 Johnson also contends that he is entitled to resentencing based on multiple inaccuracies in the PSI. We disagree.

¶29 A criminal defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant requesting resentencing due to the trial court's use of inaccurate information must prove both that the information was inaccurate and that the trial court actually relied on it at sentencing. ***Id.***, ¶¶ 2, 26. Once the defendant shows actual reliance on inaccurate information, the burden shifts to the State to prove beyond a reasonable doubt that the error was harmless. ***State v. Travis***, 2013 WI 38, ¶23, 347 Wis. 2d 142, 832 N.W.2d 491. Whether a defendant has been denied the right to be sentenced on the basis of accurate information is a constitutional issue subject to *de novo* review. ***Tiepelman***, 291 Wis. 2d 179, ¶9.

¶30 At the outset of the sentencing hearing, Johnson's defense counsel noted what Johnson perceived to be numerous inaccuracies in the PSI. *See, e.g.*, ***State v. Melton***, 2013 WI 65, ¶29, 349 Wis. 2d 48, 834 N.W.2d 345 ("Some information in a PSI 'may be unverified and some of it may be inaccurate.... [A]ffording the defendant and defendant's counsel an opportunity to examine the contents of the report permits the defendant to challenge statements and correct errors.'") (citation omitted; brackets and ellipses in ***Melton***). The inaccuracies focused mainly on errors in police reports and what defense counsel described as "errors of omission."

¶31 Johnson has not shown that the sentencing court actually relied on any allegedly inaccurate information in the PSI. The sentencing court made an extensive record, which discussed each ***Gallion*** factor and called special attention to the threat Johnson posed to the community based on the gravity of his offense and his extensive criminal record. The sentencing court noted that Johnson's previous criminal record spanned twenty years and included twenty-five prior convictions. The court also detailed the harm caused to K.M., noting that Johnson caused her to sustain numerous injuries. None of the inaccuracies defense counsel noted in the PSI pertained to the factors the sentencing court considered. Indeed, the sentencing court even explicitly stated that it was not relying on the PSI in rendering its decision. Accordingly, Johnson has not met his burden of showing that he is entitled to resentencing.

Discretionary Reversal

¶32 Finally, Johnson contends that he is entitled to a new trial in the interest of justice pursuant to our discretionary reversal power under WIS. STAT.

§ 752.35 because the real controversy—the question of who caused K.M.'s injuries—was not fully tried. We disagree.

¶33 Our supreme court has "consistently held that the discretionary reversal statute should be used only in exceptional cases." *See* ***State v. McKellips***, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258 (emphasis omitted). This is not an "exceptional" case. Johnson has not shown that counsel's alleged errors or evidence of the alleged phone calls probably would have resulted in a different outcome of his case. We conclude the real controversy has been fully tried and justice has not miscarried.

¶34 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.