COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP384-CR **Cir. Ct. No. 2007CF4269**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY A. AMAYA,

DEFENDANT-APPELLANT.

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

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Gary A. Amaya, *pro se*, appeals from a judgment, entered upon a jury's verdict, convicting him on one count of aggravated battery and one count of mayhem. Amaya also appeals from an order denying his motion for postconviction relief.[1] Amaya complains that a transcript is inaccurate and raises multiple claims of trial court error and ineffective assistance of trial counsel. We conclude the trial court did not err, Amaya has not shown trial counsel to have been ineffective, and the circuit court properly denied the postconviction motion. We therefore affirm the judgment and order.

BACKGROUND

¶2 A criminal complaint filed in September 2007 charged Amaya with one count of substantial battery, a Class I felony contrary to WIS. STAT. § 940.19(2) (2005-06).[2] The complaint alleged that in December 2006, Amaya had caused substantial bodily harm to J.H., Jr., by striking him in the face with a glass, necessitating seventy stitches. An information with this charge was filed September 13, 2007.

¶3 In February 2009, the State moved to amend the information. Upon further investigation, the State believed the extent of J.H.'s injuries warranted increasing the battery charge from substantial to aggravated battery. The State had also obtained additional information—specifically, an allegation that Amaya had

[1] The Honorable Dennis R. Cimpl presided at trial and entered the judgment of conviction. We will refer to him as the trial court. The Honorable William S. Pocan entered the order denying the motion for postconviction relief. We will refer to him as the circuit court.

[2] "Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony." WIS. STAT. § 940.19(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

twisted broken glass into J.H.'s face after striking him—which it believed warranted issuing a mayhem charge. The trial court allowed the amendment. The amended information, filed in July 2009, thus charged Amaya with one count of aggravated battery, a Class H felony contrary to WIS. STAT. § 940.19(4), and one count of mayhem, a Class C felony contrary to WIS. STAT. § 940.21.[3]

¶4 Amaya, by trial counsel, moved to dismiss one of the two counts from the amended information, asserting the charges were multiplicitous because they were "identical in law and in fact" and that aggravated battery is a lesser-included offense of mayhem. The trial court orally denied the motion to dismiss, explaining that the amendment appeared premised on the State's belief that Amaya had committed two distinct actions, first striking J.H. with the glass and then twisting the glass into his face. The trial court also rejected Amaya's request that the State make an offer of proof to support the amended information, explaining that if the State failed to meet the burden of proof at trial, Amaya could move to dismiss at the close of the State's case.

¶5 After a three-day jury trial in August 2009, the jury convicted Amaya of aggravated battery and mayhem. In March 2011—Amaya had absconded for over a year—the circuit court imposed four years' imprisonment for the battery and a concurrent nine years' imprisonment for the mayhem.

¶6 In October 2012, Amaya, by postconviction counsel, moved to supplement the record with "any stenographic records or audio recordings" taken

[3] "Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony." WIS. STAT. § 940.19(4). "Whoever, with intent to disable or disfigure another, cuts or mutilates the tongue, eye, ear, nose, lip, limb or other bodily member of another is guilty of a Class C felony." WIS. STAT. § 940.21.

by the court reporter on August 19, 2009. The motion stated that Amaya "insists … that the transcript of the court reporter's notes is defective based on omissions" from the transcript.[4] The motion did not indicate what the omissions were, so the court denied the motion because it was "without any factual support whatsoever."[5] The court further noted that even if the motion had contained a factual basis, the court would not add the requested materials to the record but would only ask the court reporter to compare her notes and recordings to the transcript and verify whether they correspond. Amaya petitioned for leave to appeal, but this court denied the petition. *See* ***State v. Amaya***, No. 2012AP2452-LV, unpublished slip op. and order (WI App Dec. 19, 2012).

¶7 Postconviction counsel was allowed to withdraw and Amaya, now representing himself, filed a *pro se* motion to correct the record in June 2013. He claimed the transcript was defective because nothing reflected that the trial court had physically received the verdict forms or that there was anything prompting the trial court and counsel to go off the record at the start of the hearing. The court again denied the motion. It noted that the court reporter had submitted an affidavit confirming that the transcript accurately reflected the proceedings held on August 19, 2009. Amaya moved for reconsideration, which was denied in July 2013. The court noted it was clear from the transcript that the trial court had been given the verdict forms. The court also cautioned Amaya that the matter

[4] The motion also indicated that postconviction counsel had "contacted trial counsel in an attempt to see whether he had the same recollection of events as did Mr. Amaya but was not able to get the desired verification."

[5] The Honorable Michael D. Guolee denied this motion, as well as a subsequent motion to correct the record and motion for reconsideration, as described in ¶7, *infra*.

would not be addressed further. Amaya did not attempt to appeal these orders, either by direct appeal or by petition for leave to appeal.

¶8 In September 2014, Amaya filed a postconviction motion alleging various trial court errors and instances of ineffective assistance of trial counsel. As set out in the introduction of his postconviction motion, Amaya alleged:

> Trial Counsel performed deficiently when he failed to the object to, (1) The Trial Court erroneously exercised its discretion when it allowed the State to amend charges of aggravated battery and mayhem …, (2) identified applicable law in order to dismissed on multiplicity grounds, (3) Trial Court erroneously exercised its discretion when it allowed the jury to hear false allegation that the defendant allegedly attempted to rape [K.G.] the victim's girlfriend …, (4) hand written note of the false accusation was provided to the jury during deliberations, (5) impeach witness [S.B.] with prior inconsistent statements, and (6) impeach witnesses [K.G.], [A.R.], and [J.H.], because their testimonies conflicted with each other and were inherently false.[6]

Amaya also again complained about the August 19, 2009 transcript. As noted, the circuit court denied the motion. Amaya appeals. Additional facts will be discussed herein as necessary.

DISCUSSION

I. Correcting the Record

¶9 Amaya's postconviction motion again requests that the August 19, 2009 stenographic records and audio recordings be produced, alleging that the

[6] We refer to J.H. by his initials, consistent with WIS. STAT. RULE 809.86 (2015-16). It appears that, in light of K.G.'s allegations against Amaya, the rule also warrants identifying her by her initials. We use initials for witnesses A.R. and S.B. for consistency.

transcript for that date is defective because "the initial reading and delivery of the verdict is missing from the record … [T]here is nothing on the record that reflects that the court ever physically received the verdict forms, or that there was any reason or event that prompted the court and the attorneys to go off the record. The fact that information has been omitted is clear."

¶10 The circuit court, in denying the postconviction motion, stated that Amaya's claim:

> stems from a former attempt to access the court reporter's notes and audio recording to correct an error which he claims occurred at the time the verdict was submitted. This issue was previously raised, reviewed and addressed … in the summer of 2013. This court declines to revisit it as all pertinent rulings have been made in that regard.

¶11 On appeal, Amaya asserts that the jury initially "brought in a wrongful verdict[.]"[7] He contends "[t]he transcript, as-is, leads to the unprecedented, inappropriate and absurd result that the verdict was delivered during the discussion off the record" and appears to assert we should undertake to reconstruct the transcript in accord with ***State v. DeLeon***, 127 Wis. 2d 74, 377 N.W.2d 635 (Ct. App. 1985). The State rejects Amaya's arguments and further contends we should apply issue preclusion to bar further litigation of the issue.

¶12 We are not fully persuaded that issue preclusion is applicable here. "'When an issue of fact or law is actually litigated, and determined by a valid and

[7] Amaya's claim on appeal is ostensibly supported by an affidavit in his appendix. The affidavit is not appropriate. It was executed in April 2016, which means it was never before the circuit court. This court is not a fact-finding court, *see* ***Lange v. LIRC***, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997), and does not hear new evidence on appeal. Further, a party may not use the appendix to supplement the record. ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

final judgment, the determination is conclusive[.]'" ***Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 302, 592 N.W.2d 5 (Ct. App. 1998) (citations omitted). "The doctrine is meant to limit relitigation of issues already decided." *See* ***id.*** at 304.

¶13 "Whether issue preclusion should bar litigation in a particular situation is a decision that must be made on considerations of fundamental fairness." *See* ***id.*** Courts thus consider several factors when deciding whether to invoke issue preclusion. *See* ***id.*** at 305. One of these factors is whether the party against whom preclusion is sought could have obtained review of the judgment. *See* ***id.*** The State appears to simply presume that the 2013 orders denying Amaya's *pro se* motion to correct the record and motion for reconsideration were final orders; however, it is not immediately apparent that those orders are or should be considered final and directly appealable.[8]

¶14 Nevertheless, we conclude that Amaya is not entitled to relief regarding the transcript. First, he does not develop any argument to show the circuit court erred when it declined to revisit the topic of correcting the transcript via the postconviction motion. We do not consider undeveloped and unsupported arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[8] The State also argues that claim preclusion might apply. We are not so persuaded. Claim preclusion requires "an identity between the parties or their privies in the prior and present suits." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). Issue preclusion also typically requires a prior and present suit. *See* ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). The State never addresses the "prior and present suit" requirement of either doctrine. While it has subsequently been held that issue preclusion need not be limited to "subsequent independent actions," *see* ***Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 304, 592 N.W.2d 5 (Ct. App. 1998), we are not aware of any case that has similarly expanded claim preclusion.

¶15 More to the point, however, Amaya fails to show "that the portion of the transcript that [he believes] is missing would, if available, demonstrate a 'reviewable error.'" *See* ***State v. Perry***, 136 Wis. 2d 92, 101, 401 N.W.2d 748 (1987) (citing ***DeLeon***, 127 Wis. 2d at 80). The transcript about which he complains opens as follows:

> THE CLERK: Case number 07 CF 4269, State of Wisconsin versus Gary Amaya.
>
> MR. LIEGEL: Chris Liegel appears on behalf of the State.
>
> MR. NISTLER: Gary Amaya appears in person along with Brent Nistler. Good morning, your Honor.
>
> THE COURT: Good morning. We got a buzz from the jury, they have a verdict.
>
> Okay, bring them in.
>
> (Jury brought in.)
>
> THE COURT: You can be seated.
>
> I want to see the lawyers.
>
> (Discussion off the record.)
>
> THE COURT: Mr. [B.], you are the foreperson, right?
>
> THE JUROR: Yes, sir.
>
> THE COURT: We are looking at the verdict forms and one of the verdict forms appears to have been signed and then your name was on it and it was dated the 18th day of August, which was yesterday, it appears to be an erasure.
>
> THE JUROR: Yes.
>
> THE COURT: Can you tell me about that?
>
> THE JUROR: It was premature.…

While Amaya complains this transcript shows the verdict was delivered off the record,[9] he develops no argument and cites no legal authority to demonstrate why a verdict delivered off the record would constitute reviewable error. "[N]ot all deficiencies in the record nor all inaccuracies require a new trial." ***Perry***, 136 Wis. 2d at 100.

¶16 Further, in denying Amaya's first *pro se* motion, the circuit court was satisfied with the court reporter's confirmation that the transcript was accurate; the court's review following the reconsideration motion further bolstered this satisfaction. *See* ***DeLeon***, 127 Wis. 2d at 82 (circuit court in a criminal case must be satisfied with record's accuracy beyond reasonable doubt). In light of the court's determinations, Amaya's continued insistence that he believes the record is inaccurate does not warrant further review or reversal. We are therefore satisfied that the circuit court properly rejected the postconviction motion's attempts to correct or reconstruct the record.

[9] In denying the motion for reconsideration, Judge Guolee stated he had reviewed the transcript and explained:

> Typically the foreperson hands the verdict to a bailiff, and the bailiff hands the verdict form to the judge. (The court reporter is not required to transcribe the act of handing the verdict to the bailiff or to the judge.) The judge then reviews the form before reading it orally in court. If there is a problem, the judge calls for a discussion between the parties. In this case, there was an apparent problem with an erasure which Judge Cimpl discussed with the parties before reading the verdict. He then read the verdict after receiving an explanation from the foreperson as to why the erasure occurred. It is clear from the transcript that Judge Cimpl was given the verdict and that it was read after the problem was resolved.

(Record citations omitted.) We agree with the inferences drawn.

II. Amending the Information

¶17 Amaya complains that the trial court erroneously exercised its discretion when it allowed the State to amend the information. He also complains that trial counsel failed to properly object to the amendment and failed to identify appropriate law when arguing to dismiss one of the charges as multiplicitous.

¶18 The information "may be amended at any time prior to arraignment without leave of the court." WIS. STAT. § 971.29(1) (2009-10). This subsection "'should be read to permit amendment of the information before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced[.]'" ***State v. Bury***, 2001 WI App 37, ¶6, 241 Wis. 2d 261, 624 N.W.2d 395 (citation omitted). Whether to allow amendment is committed to the trial court's discretion. *See* ***State v. Malcom***, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 638 N.W.2d 918.

¶19 Amaya's primary argument against amendment is that the amendments were based on information from K.G. that had not been memorialized in the police reports at the time of the incident, and her subsequent trial testimony contradicted the information on which the State had relied when seeking to amend the information. The circuit court explained that "this was apparently [K.G.'s] later impression" of what she thought she saw, and it constituted a sufficient factual basis for the amendment.

¶20 Again, Amaya does not directly address the circuit court's holding to show that it erred. With respect to K.G.'s subsequent trial testimony, we note that whatever inconsistencies may have existed, they do not serve to retroactively

undermine the trial court's earlier exercise of discretion based on the information available to it at the time.[10] As the trial court and later the circuit court explained, the State had the burden of proof and, if it failed to prove its case, Amaya could move to dismiss.

¶21 Trial counsel did indeed move to dismiss. He moved to dismiss one of the charges in the amended information as multiplicitous. He also moved to dismiss at the close of the State's case and again at the close of all evidence. As noted, though, Amaya claims that trial counsel was ineffective for failing to properly object to the amended information or cite to appropriate law.

¶22 To succeed on claims of ineffective assistance of counsel, Amaya must show both that each attorney performed deficiently and that said deficiency was prejudicial. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. To demonstrate deficient performance, Amaya must show facts from which we can conclude that the attorney's representation fell below objective standards of reasonableness. *See* ***id.*** To establish prejudice, Amaya "'must show that 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.'" *See* ***id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

[10] Amaya contends that K.G. committed perjury at trial, after which the trial court "did nothing to protect the integrity of the trial and most importantly [it] did not dismiss the mayhem charge, as [it] had proclaimed" when rejecting Amaya's call for an offer of proof to support the amendment. Amaya also complains the trial court failed to call for a mistrial after his conviction. The trial court has no such affirmative duties.

¶23 Whether a defendant was deprived of effective assistance of counsel is a mixed question of fact and law. *See* ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. The circuit court's factual findings are upheld unless clearly erroneous, but whether counsel's performance was deficient or prejudicial based on those facts is a question of law we review *de novo*. *See* ***id.***

¶24 The circuit court noted that trial counsel had moved to dismiss at the close of the State's case and again at the close of all evidence. It further found that trial counsel had "offered adequate legal argument and did not provide ineffective assistance." In his appellate brief, Amaya acknowledges that his trial attorney cited to ***State v. Koller***, 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838, which we note is an appropriate case to cite for certain multiplicity challenges. *See* ***id.***, ¶¶24-35. Amaya, however, faults trial counsel for not mentioning WIS. STAT. § 939.66, for not arguing that aggravated battery is a lesser-included offense of mayhem, and for not arguing there was only a single act warranting a single charge.

¶25 To demonstrate deficient performance, Amaya must show trial counsel's representation fell below objective standards of reasonableness. The record reveals that trial counsel discussed appropriate law on multiplicity and, while Amaya thinks counsel should have argued additional points, he has not shown that what trial counsel actually did argue was unreasonable. Trial counsel is not ineffective simply because an otherwise reasonable strategy is unsuccessful. *See* ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436.

¶26 In any event, Amaya does not show how trial counsel's failure to specifically identify WIS. STAT. § 939.66, which merely codifies the rule that a

person cannot be convicted of both a greater and lesser-included offense, prejudiced him. The case Amaya believes trial counsel should have cited to prove aggravated battery is a lesser-included offense of mayhem is an unpublished, *per curiam* opinion of the court of appeals. *See* ***State v. Strupp***, No. 2010AP1806-CR, unpublished slip op. (WI App Aug. 4, 2011). Counsel was therefore prohibited by rule from citing to it for most purposes, *see* WIS. STAT. RULE 809.23(3)(a)-(b) (2015-16), and counsel is not deficient for failing to violate the rule. Finally, whether aggravated battery is a lesser-included offense of mayhem is irrelevant when, as appears to be the case here, the jury is convinced that two separate volitional acts occurred.[11] While Amaya believes his trial attorney should have argued the "alleged hit and twisting was a single act, bereft of any volitional departure," he fails to develop an argument to show that the result of his trial would have been any different had counsel done so.

III. Failure to Impeach J.H., K.G., and A.R.

¶27 Related to his complaint about the amended information, Amaya complains that trial counsel failed to impeach victim J.H., J.H.'s girlfriend K.G., and an additional witness, A.R., "as their testimonies contradicted each other and did not support the charges." Specifically, Amaya first complains that K.G. did not initially tell police that Amaya twisted the glass in J.H.'s face. Amaya then complains that K.G. testified on direct examination that it looked like Amaya was twisting the glass, but testified on cross-examination that she "didn't see the altercation, really." A.R., meanwhile, testified that he did not see Amaya twisting

[11] It is not dispositive of the multiplicity or lesser-included analysis that the trial court showed leniency and imposed concurrent sentences "because this is really all the same incident."

the glass and that K.G. was not near the altercation. Amaya does not identify the discrepancies in J.H.'s testimony in his appellate brief.

¶28 The circuit court noted that although Amaya claimed "that trial counsel should have emphasized the inconsistencies in the various witnesses' testimony with regard to what [K.G.] claimed to have seen, the jury nevertheless heard all of the evidence, along with its inconsistencies, and made its findings based on the evidence." The circuit court stated that trial counsel "cannot be deemed ineffective for failing to point out or emphasize evidence which the jury already heard."

¶29 Amaya does not dispute the circuit court's conclusion that the jury heard all of the testimony and its inconsistencies. It is exclusively the jury's province to sort through those inconsistencies to reach a verdict and, in so doing, a jury may accept some portions of witness's testimony while rejecting other parts. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). While Amaya complains that trial counsel should have further highlighted these inconsistencies, he has not developed any prejudice argument to show how trial counsel's further emphasis of certain evidence would have been reasonably probable to yield a different result. *See, e.g.*, ***United States v. Jackson***, 935 F.2d 832, 845-46 (7th Cir. 1991) (counsel is not ineffective for failing to introduce cumulative evidence).

IV. Failure to Impeach S.B. with an email

¶30 S.B. was unavailable to testify at the time of the preliminary hearing, so he sent an email to Amaya's brother on October 7, 2007, nearly ten months after the altercation between Amaya and J.H. This email suggests, among other things, that K.G. "pushed" Amaya and J.H. into an altercation and that Amaya's

glass broke because he and J.H. fell to the ground, not because he hit J.H. with it. According to Amaya, this email tells a "different story" than S.B.'s trial testimony, where S.B. said he did not see any glass at all. On appeal, Amaya complains that trial counsel "failed to impeach witness [S.B.] with his own email."

¶31 Trial counsel had, in fact, moved to admit S.B.'s email, but the trial court denied the request. Amaya complains that trial counsel should have objected to the ruling and should have moved to admit the email as either a prior inconsistent statement to impeach the witness or as a writing used to refresh recollection under WIS. STAT. § 906.12. The circuit court determined that Amaya's "contention that counsel should have fought with the court over its ruling is unsupported by any showing that he would have been successful in his efforts…. Even assuming [S.B.'s] e-mail was admissible, there is not a reasonable probability the outcome of the trial would have been any different."

¶32 First, we note that S.B. was called as a defense witness. Under WIS. STAT. § 906.12, "an adverse party is entitled to have" a witness's writing used to refresh recollection into evidence. Thus, the party entitled to have the email introduced under § 906.12 would have been the State as the adverse party, not Amaya. Counsel is not ineffective for failing to pursue a meritless argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

¶33 Further, we agree that Amaya has not shown a reasonable probability of a different result, especially on his argument that trial counsel should have impeached S.B. with a prior inconsistent statement. "A prior inconsistent statement, if otherwise admissible … goes to credibility of the witness and the weight of the testimony as an aid to the trier of fact." ***Foryan v. Firemen's Fund Ins. Co.***, 27 Wis. 2d 133, 140, 133 N.W.2d 724 (1965). Amaya

has not shown how impeaching the credibility of his own witness would have aided his case.

V. Testimony and Instruction Regarding Attempted Sexual Assault

¶34 Prior to trial, the State and trial counsel had a lengthy discussion with the trial court about whether to admit testimony that K.G. had told J.H. that Amaya had attempted to rape her. Amaya was not charged with any sexual assault of K.G., but the State thought a brief mention of the accusation was appropriate because K.G.'s statement to J.H. caused J.H. to confront Amaya, leading to the altercation. Trial counsel objected, but the trial court ultimately agreed with the State that the information was important for context. A cautionary instruction was drafted by the parties, and the jurors were instructed that any such testimony was to be used solely to explain why J.H. had confronted Amaya. The instruction further informed the jury that Amaya was not charged with any crime stemming from K.G.'s allegations.

¶35 In his postconviction motion, Amaya complained that the testimony and the jury instruction were inappropriate other acts evidence. The circuit court stated that it could not find "that [K.G.'s] statement was improperly admitted or that it constituted inadmissible other acts evidence." On appeal, Amaya renews his objection to other acts evidence and complains trial counsel was ineffective for not arguing the evidence had no proper purpose and for not arguing "there was no legal or logical reason" for allowing the jury to hear about K.G.'s allegations.

¶36 "Except as provided … evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2)(a) (2009-10). "[O]ther-acts evidence that is offered for a purpose other than the prohibited propensity

purpose is admissible if it is relevant to a permissible purpose and it is not unfairly prejudicial." ***State v. Marinez***, 2011 WI 12, ¶18, 331 Wis. 2d 568, 797 N.W.2d 399.

¶37 We do not perceive K.G.'s allegations to have been offered as propensity evidence. We are further unpersuaded that the trial court erred when it concluded evidence of her allegation against Amaya was admissible to provide context to the jury. To the extent that Amaya claims trial counsel was ineffective for not developing additional arguments against the evidence's admission, he again fails to develop any prejudice argument—that is, he does not show that a different argument by counsel would have been reasonably probable to produce a different result.

¶38 Amaya additionally appears to be claiming that a "handwritten note" was provided to the jury during deliberations as evidence, "[a]pparently, to remind the jury about the rape allegations during deliberations[.]" The "handwritten note" was the cautionary jury instruction, handwritten by trial counsel's co-counsel moments before the trial began. Amaya does not show it was error to provide the jury with the copy of the handwritten jury instruction.

SUMMARY

¶39 We are not persuaded that the circuit court erred in denying Amaya's postconviction motion. Amaya has not adequately shown that the record is in need of correction, that the trial court erred in exercising its discretion, or that trial counsel provided any ineffective assistance.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).