COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2016AP2043
2016AP2044

Cir. Ct. No. 2011CF4621

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. FARRELL,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. In these consolidated appeals, Michael A. Farrell, *pro se*, appeals from a trial court order denying his WIS. STAT. § 974.06 (2015-16) motion for postconviction relief.[1] He also appeals from an order denying his motion for reconsideration. Farrell argues that his postconviction counsel provided constitutionally deficient representation at the postconviction ***Machner*** hearing and by failing to raise three additional allegations of trial counsel ineffectiveness.[2] We reject Farrell's arguments and affirm.

BACKGROUND

¶2 Farrell was charged with three counts of repeated sexual assault of a child and one count of exposing a child to harmful material. At trial, the State presented the testimony of five witnesses: the child, her mother, a doctor who conducted a forensic exam of the child, a detective who interviewed the child, and an officer involved in locating Farrell.

¶3 Notably, Dr. Kelly Hodges testified that she did not find evidence of sexual assault when she examined the child months after the alleged assaults. Hodges explained why evidence of sexual assault may not be present even when a sexual assault has occurred. Farrell's trial counsel had the opportunity to cross-examine Hodges but chose not to do so.

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

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

¶4 Farrell did not testify and the defense did not present any witnesses, focusing instead on challenging the child's credibility and the lack of physical evidence of sexual assault. The jury found Farrell guilty of all four charges.

¶5 After sentencing, Farrell filed a postconviction motion alleging that trial counsel provided ineffective assistance by failing to cross-examine Hodges and present a defense expert to challenge Hodges's testimony. The trial court conducted a ***Machner*** hearing at which trial counsel offered several reasons for his strategic decision not to cross-examine Hodges.[3] One reason trial counsel cited was his decision "to cross-examine the examining nurse about all those issues." However, no nurse testified at trial. Neither postconviction counsel nor the State brought this to trial counsel's attention at the ***Machner*** hearing, so trial counsel was not given an opportunity to explain whether he was referring to a different witness, thinking of a different trial, or something else.

¶6 After the hearing, postconviction counsel filed a brief that recognized there had been no trial testimony from a nurse. The brief stated:

> Trial counsel testified that he covered what he felt was important as to the lack o[f] injury through his cross of a[n] "examining nurse" because she might be less prepared for cross[-]examination than the expert herself. Trial counsel then indicated that he reviewed that testimony with the jury in his closing. What trial counsel had forgotten was that there was no testimony from an examining nurse and no other testimony at all as to the lack of injury from any other witness. The only testimony on this most important fact came from the State['s] expert and at trial [trial counsel] had not a single question to ask of her.

[3] The Honorable Richard J. Sankovitz presided over the trial and sentencing. The Honorable Jeffrey A. Wagner decided the postconviction motion and the WIS. STAT. § 974.06 motion at issue in this appeal.

(Record citations omitted.) Although postconviction counsel raised this issue in his post-hearing brief, the proposed findings of fact and conclusions of law filed by both parties did not address the lack of trial testimony from a nurse. The trial court denied the postconviction motion in a written order, adopting the State's proposed findings of fact and conclusions of law as its decision.

¶7 On appeal, Farrell continued to challenge trial counsel's strategic decision not to cross-examine Hodges. In its brief, the State brought to this court's attention the problem with trial counsel's assertion that he relied on his cross-examination of a nurse. Specifically, after mentioning several reasons trial counsel offered in support of his strategic decision, the State added this footnote:

> Counsel also testified that he strategically chose to cross-examine the examining nurse instead of the State's expert, because counsel believed the examining nurse might be less prepared than the expert witness. However, based upon the transcripts in the record, it appears counsel misspoke as an examining nurse did not testify at trial. Regardless, counsel's decision to not cross-examine the State's expert was objectively reasonable as addressed above.

(Record citation omitted.)

¶8 This court rejected Farrell's arguments and affirmed his convictions. *See* ***State v. Farrell***, No. 2014AP330-CR, unpublished slip op. (WI App Nov. 25, 2014). Addressing Farrell's concerns about the lack of cross-examination of Hodges, this court discussed some of trial counsel's reasons for not doing so:

> [T]rial counsel testified that he did not believe cross-examining Hodges would be beneficial. For one thing, he thought that the doctor would be "hostile to my cross-examination." Additionally, he opined that Hodges's credentials were unassailable. Further, Hodges had explained why she was not surprised by the lack of observable injury; specifically, children do not always

> immediately report sexual assault, and the usually affected areas are made of mucus membranes—tissue that heals quickly. Here, nine to ten months had passed between the last assault and the victim's disclosure, so counsel thought that Hodges's conclusion, that no injuries would be visible, was well supported by the Record.

See ***id.***, ¶7. This court agreed with the trial court's conclusion "that there was no deficient performance because trial counsel made a reasonable, strategic choice." *See* ***id.***, ¶8. Notably, we did not rely on trial counsel's statements about a nurse's testimony in our analysis. Further, we concluded that in addition to not proving deficient performance, Farrell had not demonstrated "prejudice from trial counsel's decision not to cross-examine Hodges." *See* ***id.***, ¶9.

¶9 After we affirmed Farrell's convictions, he filed a petition for review with the Wisconsin Supreme Court, which was denied. In September 2016, Farrell filed the *pro se* WIS. STAT. § 974.06 motion that is at issue on appeal. In that motion, Farrell argued "that he was denied a fair ***Machner*** [h]earing" and that his postconviction motion should have been granted. (Bolding and italics added.) He asserted that trial counsel perjured himself when he referred to testimony from a nurse and that the State committed perjury by not bringing to the trial court's attention the fact that no nurse testified at trial. Farrell alleged that "[p]ostconviction counsel was ineffective for not informing the court there was NO other witness."[4]

¶10 Farrell's motion also alleged that postconviction counsel was ineffective for not alleging that trial counsel performed ineffectively by: (1) not

[4] Farrell's WIS. STAT. § 974.06 motion did not acknowledge that postconviction counsel did, in fact, mention the lack of testimony by an examining nurse in post-hearing briefing, although not in the defense's proposed findings of fact and conclusions of law.

presenting argument in support of the defense's motion to dismiss at the close of the State's case; (2) allowing the trial court at sentencing to rely on inaccurate information; and (3) not calling a state crime lab technician to provide testimony concerning which evidence was subjected to DNA testing.

¶11 In a written order the trial court denied Farrell's motion without a hearing. With respect to the first issue, concerning trial counsel's testimony at the ***Machner*** hearing about a nurse's testimony, the trial court stated:

> The defendant is correct in that there was no examining nurse o[r] nurse practitioner who testified at trial; at best, it was the forensic detective … who had interviewed the child victim and of whom [trial counsel] was probably thinking. This does not mean he purposely lied; his recollection may simply have been faulty.
>
> Based on the issue raised, postconviction counsel's performance was clearly deficient in this regard. However, the defendant must nevertheless establish that he was also prejudiced by postconviction counsel's performance….
>
> In this case with respect to trial counsel's failure to cross-examine the State's expert witness, the Court of Appeals found that the defendant was not prejudiced by counsel's failure to do so. Significantly, it did not ground its decision on counsel's testimony that he relied on an "examining nurse" as his strategic[] reason for not cross[-] examining her.

The trial court concluded that "[n]othing new has been presented here from what was before the Court of Appeals, and its decision has become the law of the case." The trial court also observed that "nothing new [has] been presented to establish the prejudice prong of ineffective assistance."

¶12 The trial court rejected Farrell's new claims about trial counsel's performance, concluding those claims were not clearly stronger than the claims

postconviction counsel chose to pursue. Farrell filed a motion for reconsideration, which the trial court denied. This appeal follows.

DISCUSSION

¶13 WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. *See* ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, the statute "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Thus, a defendant who has had a direct appeal or another postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. *See* ***id.***

¶14 A claim of ineffective assistance from postconviction counsel may present a "sufficient reason" to overcome the ***Escalona-Naranjo*** procedural bar. *See*, *e.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, a defendant can overcome the presumption of effective assistance only if he can "show that 'a particular nonfrivolous issue was clearly stronger than issues that counsel did present.'" ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668 (applying "clearly stronger" standard to evaluation of § 974.06 motions "when postconviction counsel is accused of ineffective assistance on account of his [or her] failure to raise certain material issues before the [trial] court") (citations, italics, and one set of quotation marks omitted). Whether a procedural bar applies

is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶15 To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Id.*** at 697. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant 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." ***Id.*** (citations and internal quotation marks omitted).

¶16 Applying those legal standards here, we conclude that Farrell's WIS. STAT. § 974.06 motion is procedurally barred.[5] First, he is barred from relitigating issues that were decided in his direct appeal. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). Farrell's § 974.06 motion attempts to

[5] We also reject Farrell's attempt to raise new issues in his opening brief and in his reply brief. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (Arguments raised for the first time on appeal are generally deemed waived.); ***State v. Chu***, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878 (Court will not address issues raised by an appellant for the first time in a reply brief.). Accordingly, we do not discuss many of the assertions Farrell has made for the first time on appeal.

relitigate an issue by asserting that postconviction counsel should have argued that trial counsel perjured himself at the ***Machner*** hearing when he referenced testimony from a nurse. Farrell's motion fails to acknowledge that postconviction counsel brought that issue to the trial court's attention in post-hearing briefing and that the State brought that issue to this court's attention in its appellate brief. This court was therefore aware of that information, and our decision did not rely on trial counsel's statement when analyzing whether trial counsel's performance was deficient. Farrell cannot relitigate the issue of trial counsel's ineffectiveness concerning cross-examination of the doctor. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶17 Moreover, as the trial court noted, Farrell's WIS. STAT. § 974.06 motion did not provide any additional information or argument concerning how trial counsel's alleged deficiency prejudiced him. Once again, Farrell has not identified "what questions trial counsel should have asked Hodges on cross-examination" and he has not "explain[ed] how those questions and their answers would have resulted in a different verdict." *See* ***Farrell***, No. 2014AP330-CR, ¶9. Thus, even if this court were to revisit the issue, Farrell's ineffective assistance claim against trial counsel still fails because he has not established prejudice. *See* ***Strickland***, 466 U.S. at 687.

¶18 Next, Farrell's WIS. STAT. § 974.06 motion asserted that postconviction counsel was ineffective for not arguing that trial counsel performed ineffectively by: (1) not presenting argument in support of the defense's motion to dismiss at the close of the State's case; (2) allowing the trial court at sentencing to rely on inaccurate information; and (3) not calling a state crime lab technician to provide testimony concerning which evidence was subjected to DNA testing. Farrell's § 974.06 motion did not allege, much less demonstrate, that these new

issues were clearly stronger than the issues raised in his direct appeal. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46. His new claims fail on that basis and also because Farrell has not demonstrated that he was prejudiced by trial counsel's or postconviction counsel's alleged failures to act.

¶19 Farrell's first new allegation is that his trial counsel should have offered argument in support of the defense motion to dismiss at the close of the State's evidence, rather than simply stating: "Move to dismiss for failure to establish a prima facie case. No argument." Even if we assume that trial counsel's performance was deficient because he offered no argument in support of the motion, Farrell's claim still fails because he has not demonstrated prejudice.

¶20 "The test of the sufficiency of the evidence on a motion to dismiss … is whether, considering the [S]tate's evidence in the most favorable light, the evidence adduced, believed and rationally considered, is sufficient to prove the defendant's guilt beyond a reasonable doubt." ***State v. Duda***, 60 Wis. 2d 431, 439, 210 N.W.2d 763 (1973). Here, the State presented testimony from the child that Farrell sexually assaulted her and showed her a pornographic video. Viewed in a light most favorable to the State, this evidence was sufficient to allow the case to proceed. *See* ***id.*** When trial counsel moved to dismiss, the trial court applied the appropriate legal standard and explained its decision to deny the motion. Farrell has not demonstrated that trial counsel's performance was prejudicial and, therefore, he has not shown that postconviction counsel was deficient for not alleging trial counsel ineffectiveness on this issue or that this issue was clearly stronger than the issues postconviction counsel chose to pursue.

¶21 The second new allegation of trial counsel ineffectiveness in Farrell's WIS. STAT. § 974.06 motion concerns the trial court's alleged reliance on

inaccurate information twice at sentencing. We conclude that Farrell has not demonstrated postconviction counsel was ineffective for failing to allege trial counsel ineffectiveness concerning the sentencing or to seek resentencing.[6]

¶22 A defendant seeking resentencing for the trial court's use of inaccurate information must show that the information was inaccurate and that the sentencing court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶¶2, 26, 291 Wis. 2d 179, 717 N.W.2d 1. The first piece of alleged misinformation at issue here was the victim's mother's trial testimony that after learning of the alleged abuse, she telephoned Farrell twice to confront him. She testified that on the second call he said: "'I am partying or whooping it up. I'm having a few beers before I spend the rest of my life in jail.'" At sentencing, neither party referenced that testimony, but in the course of offering its sentencing remarks, the trial court said:

> In judging how much of your life we should use up, I think you probably put it best. The evidence that clinched this case, I think the evidence that made a huge difference to the jury in this case is what you said to [the victim's mother] on the telephone that day. You were whooping it up because you were going to spend the rest of your life in jail.
>
> When a person says that, I don't think they really mean every last breathing moment that they have, but they do understand that the best part of their life, they've now forfeited to spend that in jail.

[6] Farrell's motion primarily faults postconviction counsel for not alleging trial counsel ineffectiveness but some of his arguments can also be interpreted as suggesting that postconviction counsel could have filed a motion for resentencing based on the trial court's alleged reliance on misinformation without alleging trial counsel ineffectiveness.

¶23 Although Farrell did not contradict the trial court's statement at sentencing, he asserted in his WIS. STAT. § 974.06 motion that his "actual statement" to the victim's mother on the telephone was: "I'm going out to get drunk one last time before going to jail for something I didn't do." Farrell's § 974.06 motion cited a police report that explained that when the officers made plans to apprehend Farrell, they were aware that he "had been tipped off by the victim's mother and had made statements that he was going out to get drunk one last time before going to jail for something he didn't do." Farrell argued that trial counsel and postconviction counsel provided ineffective assistance by ignoring the victim's mother's "inaccurate statement."

¶24 We agree with the State that Farrell cannot demonstrate he was prejudiced by postconviction counsel's failure to raise this issue because he cannot demonstrate that the woman's testimony was inaccurate.[7] He can point only to a police report's second-hand account of what Farrell might have said. Farrell could not successfully seek resentencing. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶¶2, 26.

¶25 The second piece of alleged misinformation at issue concerns the length of time over which the crimes occurred. Farrell was charged with committing his crimes over a twenty-seven month period. Farrell's motion asserted that the child's testimony suggested the abuse occurred over a shorter period of time—between six and nine months. Farrell argues that when the trial

[7] Having concluded that Farrell cannot demonstrate the information was inaccurate, we decline to address the State's argument that Farrell also cannot demonstrate that the trial court relied on that information when imposing sentence. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

court said at sentencing that Farrell had abused the child "for so long and so deviously," the trial court was relying on misinformation. We are not persuaded. Even if we accept Farrell's calculation of the length of the abuse, we disagree that the trial court's remarks indicated it was relying on a period of time longer than the child identified. Farrell could not successfully seek resentencing based on the trial court's statement. *See* ***id.***

¶26 For these reasons, we conclude that Farrell has not demonstrated a basis for relief related to the trial court's remarks at sentencing. It follows that he has not demonstrated that he was prejudiced by postconviction counsel's alleged deficiencies or that this issue is clearly stronger than the issues postconviction counsel chose to pursue.

¶27 The third instance of alleged trial counsel ineffectiveness raised in Farrell's WIS. STAT. § 974.06 motion concerned the lack of testimony from a state crime lab technician. During trial, the detective testified that no DNA was recovered from certain items that were seized from Farrell's vehicle. Trial counsel asked the detective how she decided which pieces of evidence should be tested for DNA evidence. When she responded that the DNA analyst made the determination, the trial court said: "Let's move on then. We need that evidence from the DNA analyst."

¶28 Farrell's WIS. STAT. § 974.06 motion alleged that postconviction counsel should have asserted that trial counsel was ineffective for failing "to investigate and interview the crime lab technician on the fact there was no DNA found on anything, and call [the technician] as a defense witness." However, Farrell's motion did not adequately explain what information would have been found and how it would have affected the verdict, especially where the jury heard

that there was no DNA evidence of the alleged sexual assaults. Farrell has not demonstrated that he was prejudiced by trial counsel's alleged failure to call a crime lab technician. It follows that he failed to demonstrate postconviction counsel ineffectiveness for failing to raise this issue or that this issue was clearly stronger than the issues postconviction counsel chose to pursue.

CONCLUSION

¶29 For the foregoing reasons, Farrell has not established that his postconviction counsel provided ineffective assistance. *See* ***Strickland***, 466 U.S. at 687; ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46. Therefore, he has not established a basis to overcome ***Escalona-Naranjo***'s procedural bar. *See* ***id.***, 185 Wis. 2d at 185; ***Rothering***, 205 Wis. 2d at 682. We affirm the order denying Farrell's WIS. STAT. § 974.06 motion and the order denying reconsideration.

By the Court.—Orders affirmed.

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