COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2016AP408-CR **Cir. Ct. No. 2011CF78**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. BELOW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County: BERNARD N. BULT, Judge. *Affirmed.*

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, 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. Mark Below appeals an order that denied his postconviction motion for a new trial without a hearing. The postconviction motion raised multiple claims of ineffective assistance of counsel and one claim of judicial bias. For the reasons discussed below, we conclude that the allegations in Below's motion were insufficient to warrant a hearing. Accordingly, we affirm the order of the circuit court.

BACKGROUND

¶2 The State charged Below with three counts of first-degree sexual assault of a child and one count of exposing a child to harmful material after a five-year-old girl reported to her mother that Below had molested her while she had been staying at Below's house one weekend in June of 2011. At trial two years later, the State introduced the video and a transcript of an interview that a social worker had conducted of the child about two weeks after the incident, and made the then-seven-year-old child available for cross-examination.

¶3 As described by the child in her interview with the social worker, the child stated that Below had sat her down on his lap in front of a computer and showed her a video of girls playing with a man's "winkie" while Below reached under the child's clothing to touch her "private" area. Below then had the child take her clothes off, licked her "private" area, and put his own "winkie"—which she described as hard like a pencil—in or on her private area until a milk-like substance came out of the tip of Below's winkie.

¶4 On cross-examination, the child testified both that the incident had occurred in Below's bedroom at Chris's house when it was "light" outside, and that it had happened around noon at a house belonging to another friend of Below's where they had had lunch.

¶5 The State also introduced testimony from the child's mother, who relayed that the child had told her that the incident had occurred at Below's residence and never mentioned any other place; from the social worker who conducted the interview with the child, who relayed that a doctor had examined the child and had not found any tearing, bruising, or injury to the child's vaginal area but had made a referral to child services because she could not rule out sexual abuse; and from a DOJ computer analyst and the lead detective, who testified about pornographic images recovered from Below's computer.

¶6 Below took the stand on his own behalf, and was the sole witness for the defense. Below testified that, in June of 2011, he had been sharing a house in Harris Township with his friend Christopher. On the day in question, Below said that he, the child, and the child's brother had gone fishing in Montello at about 8:00 a.m., then went over to Below's cousin's house in Berlin for lunch between 11:00 and 11:30 a.m. and stayed there until about 4:30 p.m., then went back fishing until about 6:00 p.m., then went back to the house Below shared with Christopher to have dinner. Below denied having the child in his lap, watching pornography with her, touching or licking her vagina, inserting his penis into her vagina, or ejaculating in front of her.

¶7 The jury convicted Below on all counts. Below subsequently filed a postconviction motion alleging that trial counsel provided ineffective assistance by: (1) failing to call Tessa Malsack to testify that she had seen Below, the child, and the child's brother heading out to go fishing on the morning in question; (2) failing to call Coreena Pafford to testify that she had seen Below, the child, and the child's brother at a gas station in Montello on the day in question; (3) failing to call Jessie Goratowski, Jamie Kaiser, and Dylan Shreve to testify that Below, the child, and the child's brother had been at their house for lunch on the day in

question and had stayed for several hours; (4) failing to call the doctor who had examined the child and found no trauma to her vaginal area; and (5) failing to call a computer expert to testify that the graphics on Below's computer did not have sufficiently high resolution to display the pornographic images recovered. Below also alleged that the circuit court exhibited bias against him by refusing to make accommodations to allow Goratowski to testify the day after the trial.

¶8 The circuit court denied Below's postconviction motion without a hearing.

STANDARD OF REVIEW

¶9 In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant 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 that the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. *See* ***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 he or she 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. *See* ***Allen***, 274 Wis. 2d 568, ¶23.

DISCUSSION

¶10 As to the first five alibi witnesses that Below contends counsel should have called, none of their testimony would have had any effect on the outcome of the trial because the State did not dispute at trial that Below left in the morning to take the victim and her brother fishing on the day in question, or that they went to Below's cousin's house for lunch and stayed there for several hours during that afternoon. Given that the incident occurred in June, near the longest day of the year, Below would still have had plenty of time to return to his house with the children and to have assaulted the victim while it was still light out.

¶11 As to calling the doctor, it was unnecessary because defense counsel was able to rely on the social worker's testimony to argue to the jury that the child's account had not been corroborated by any doctor's findings of physical injury to the child. Moreover, it could actually have been more harmful to the defense to have the doctor go into additional detail about why the doctor was unable to rule out a sexual assault and to explain why the doctor made the referral to child services.

¶12 As to calling a computer expert, Below has not identified any computer expert who would have provided the testimony that he alleges counsel should somehow have been able to produce.

¶13 Finally, the record shows that the circuit court's refusal to accommodate Below's witness was the result of Below's late disclosure of the witness, and the lack of an available court reporter. There is nothing in the record to suggest that the circuit court had any personal bias against Below.

¶14 We conclude that the allegations in Below's motion were insufficient to establish prejudice from any of trial counsel's alleged errors, or to show that the circuit court exhibited any bias against Below.

By the Court.—Order affirmed.

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