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DISTRICT IV

December 20, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1260-CR State of Wisconsin v. Ernesto J. Hernandez (L.C. # 2013CF1421)

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

Summary disposition orders 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).

Ernesto Hernandez appeals a judgment of conviction and an order denying postconviction relief. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹
We affirm.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697. To demonstrate 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. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Hernandez argues that his trial counsel was ineffective by not presenting an expert to comment on a video interview of a child witness, and by not calling the child witness to the stand for cross-examination. As prejudice, he asserts that the child's testimony may have been the sole or deciding factor in the verdicts because the jury asked for a transcript of the interview during deliberations. Hernandez further asserts that cross-examination was necessary because otherwise the jury might conclude that the defendant does not dispute the testimony.

These assertions fail to develop an argument. The test for prejudice looks at the potential effect of counsel's performance on the outcome of the trial. Here, the appellant's opening brief makes no effort to discuss the other evidence presented at trial or how the jury may have perceived the child's testimony in the context of the larger case. Without such a discussion, it is

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

merely speculation to say, as he does, that the child's testimony may have been the sole or deciding factor.

Similarly, the assertion that Hernandez was prejudiced by lack of cross-examination of the child witness is cursory. Again, it is made without any discussion of the child's testimony in the larger context of the case. And it fails to recognize that sometimes more prejudice might be caused by conducting cross-examination of a child witness than by *not* cross-examining.

In sum, neither of these assertions is a developed argument. We are not required to address undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments). Here, the appellant has failed to develop his arguments factually. Therefore, we affirm the circuit court on that basis.

Beyond that, even if we consider the substance of Hernandez's assertions, we also affirm. The State's brief discusses in detail the evidence corroborating the testimony by the victim and her daughter, and describes the credibility challenges that Hernandez made at trial to that testimony. In reply, Hernandez again fails to discuss the larger record and basically just repeats the inadequate assertions from the opening brief. Accordingly, Hernandez has failed to establish that there is a reasonable probability of a different outcome.

IT IS ORDERED that the judgment and order appealed are summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals