**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 9, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-2555-CR** **Cir. Ct. No. 01 CF 755**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN ALLEN,**

**DEFENDANT-APPELLANT.**

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

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. John Allen appeals from a judgment entered on jury verdicts finding him guilty of two counts of first-degree sexual assault of a child and one count of second-degree sexual assault of a child. *See* WIS. STAT.

§ 948.02(1) and (2) (1995–1996).[1] He also appeals from an order denying his postconviction motion. Allen alleges that: (1) his trial counsel rendered ineffective assistance because he did not investigate or prepare for trial; (2) the trial court erroneously exercised its discretion when it denied his postconviction motion without a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979); and (3) he is entitled to a new trial in the interest of justice. We affirm.

I.

¶2 John Allen was charged with sexually assaulting Kelyanna A., Tekiara B., Shalisia B., and Erica J. Tekiara and Shalisia were Allen's stepchildren. They lived with Allen and their mother, Lynn Allen, when the State contended that the assaults occurred. Several years after she was allegedly assaulted by Allen, Shalisia wrote a letter to Patricia B., Tekiara's and Shalisia's stepmother, accusing Allen. Patricia B. called her husband and the children's biological father, Bobby B. Bobby B. called the police.

¶3 All of the alleged victims testified at trial. As relevant, Tekiara and Shalisia testified that they were assaulted by Allen approximately five to six years earlier. Tekiara claimed that she was "happy" living with her mother, who, as noted, was then living with Allen, while Shalisia testified that she wanted to live with her father, Bobby B.

¶4 Allen also testified at trial. He claimed that Tekiara and Shalisia falsely accused him of sexually assaulting them. When asked why they would do

[1] All references to the Wisconsin Statutes are to the 1995–1996 version unless otherwise noted.

so, Allen suggested that Tekiara and Shalisia were upset with him because he wanted to punish them for not washing the dishes. During closing arguments, his attorney advanced the theory that Bobby B. told the children to lie about the assaults in order to improve his chances of getting primary physical placement of the children. A jury convicted Allen of two counts of first-degree sexual assault of Tekiara B. and Shalisia B. and one count of second-degree sexual assault of Kelyanna A., and acquitted him of one count of first-degree sexual assault in connection with Erica J.

¶5 Allen filed a postconviction motion claiming that his trial counsel was ineffective for failing to: (1) properly prepare to examine Bobby B., a defense witness; and (2) file a motion pursuant to ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), *clarified by* ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, for an *in camera* inspection of allegedly exculpatory evidence.[2] The trial court denied the motion without a ***Machner*** hearing.

II.

*A. Ineffective Assistance of Counsel*

¶6 Allen alleges that the trial court erred when it denied his ineffective-assistance-of-counsel claims without a ***Machner*** hearing. The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to

[2] Allen also: (1) claimed that his trial counsel was ineffective because he did not call Lynn Allen, Allen's wife and Tekiara's and Shalisia's mother, to the stand at trial; and (2) requested postconviction discovery. Allen has not argued these issues on appeal. Thus, they are waived. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not briefed are waived).

prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶7 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[t]he 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.*** at 694.

¶8 Our standard for reviewing this claim involves mixed questions of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶9 A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however:

> the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

***Id.***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted).

¶10 Allen claims that his trial counsel was ineffective because he failed to adequately investigate. He bases his claim, in part, on the following statement he made to the trial court:

> THE DEFENDANT: It was to my knowledge that one of these counselors they have before me -- they have before you today, I had assumed that it was a social worker working for the State, went to one of the witness['s] school, and talked to that child after, they have a tape, I believe here on tape, or something like that. But a social worker, or I assume that it was a social worker that had went to the child's school and talked to her. And once she had got through talking to the child, this person called my wife and notified my wife that I should not have been charged, should not have been brought upon me.
>
> At that time I assumed that it was a social worker, but I here now that it was a person who --
>
> THE COURT: Mr. Allen, I am going to interrupt you for a second. Have you discussed this with your attorney?
>
> THE DEFENDANT: I have discussed, several times I have discussed it with him. But the DA has said that he -- this is the first time hearing about it. [My attorney] said that he heard about it, of what I had told him about it, but he said he haven't found evidence as far as the issue.
>
> But they sent their private investigator to my wife, and my wife told them about this. We found out that she working for the district attorney['s] office or someone from the State.
>
> Now this woman is not to be found. She has a statement that is stating that this child has told her a completely different story, it was on file they told her that.

Allen claims that this exchange shows that his trial counsel should have spoken to additional witnesses and investigated further to determine whether exculpatory evidence existed. The record belies this claim. After Allen made his statement, his attorney assured the trial court that he was aware of Allen's allegations and had investigated them without success:

> I would say that we have discussed this. We have investigated it. I have viewed two videotapes[.] I have viewed all the prior descriptions in the discovery. I have sent an investigator out who has interviewed all of the key witnesses. The facts do not substantiate what Mr. Allen would like to believe. It has been investigated.

Moreover, the prosecutor informed the court that he had turned all discovery over to Allen's attorney:

> The defendant attempted to raise this same issue before Judge DiMotto before this case was transferred to this court. I do not know what he is talking about. There was a videotaped statement taken of one of the State's witnesses, Tekiara B[.] That was, that statement was taken, I believe, by Margaret Flood, F-L-O-O-D.
>
> Is that correct, … was it Miss Margaret Flood, one of the staff social workers at Child Protective Services? She does not work for the DA's office, and she is still employed as far as I know.
>
> I don't know exactly what the defendant is getting to, but if it's in the information on the videotape, it's been in [Allen's attorney's] possession for some time, and he had an opportunity to investigate it.
>
> [Allen's attorney] did make some comments before. He may wish to revisit those comments here today, but I am not specifically sure what the defendant is talking about. But I certainly have not kept any information, inculpatory, exculpatory or otherwise.

The record demonstrates that Allen has not made a colorable claim that his lawyer did not adequately investigate his case. Allen has not shown beyond mere

assertion that his trial lawyer did not review all of the discovery materials. Additionally, he has not rebutted the lawyer's statement in open court that he had a private investigator interview all of the relevant witnesses and investigate Allen's claim that exculpatory evidence existed. Further, Allen does not point to any exculpatory evidence his attorney should have discovered. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (a defendant who alleges a failure to investigate by his trial counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case).

¶11 Allen also claims that his trial counsel's "preparation for trial" was deficient because he did not prepare a "logical … theory of defense." (Uppercasing omitted.) As proof, Allen refers to his attorney's oral motion to admit Bobby B.'s prior conviction for sexual assault under WIS. STAT. RULE 904.04(2):

> The motive is on the part of the children, the B[.] children, to carry out and Shalisia to fabricate this story. It think it's relevant for two reasons, both as I stated, under 904.04(2). The motive is that this particular witness may, and I'm just saying we should be allowed to argue their going into this, in the first place, we're now assuming in advance, not knowing what the evidence even is as to whether we can explore this. But we have reason to believe that this man, who is the father and natural father of two of the victims, has been convicted himself of sexual abuse of a child; has spent a year of incarceration because of it. Shortly after he was released from incarceration, he writes a letter to the Police Department complaining that the stepfather has been sexually abusing the children. At the same time, he has been attempting to get primary placement or for visitation with those children, just as he has a motive to make the defendant in this case look like an inadequate replacement parent; that he's a threat to these children, thus furthering his chances of getting custody and/or primary placement. That's consistent with the pressure that has been brought to bear upon the children by him and perhaps others working

> with him to get them to make these allegations or charges against their stepfather.
>
> Also, the type of conduct that he has been convicted of would be relevant as far as imparting knowledge to these victims of the type of conduct that constitutes sexual abuse of a child and which would be such a foreign concept to these children, their father having been convicted of it as opposed to somebody else who had no experience or relationship of that.

The trial court denied the motion pursuant to ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998): "[Y]ou just can't throw out the fact that Mr. B[.] has this prior conviction for sexual assault because I think it will just mislead and confuse the jury and be extremely prejudicial to this case." Allen claims that this is "the most compelling indication" that his attorney was not prepared to defend the case because he did not "explain or put forward any reason, whatsoever, for [Allen's] accusers to have the motive to fabricate." We disagree.

¶12 It is clear from the attorney's statement set out above that he presented the theory that Tekiara and Shalisia lied about the sexual assaults so that they could live with their father: "The motive is on the part of the children, the B[.] children, to carry out and Shalisia to fabricate this story…. [Bobby B.] has been attempting to get primary placement or for visitation with those children." Moreover, as noted, Shalisia testified on cross-examination that she wanted to live with Bobby B[.] and admitted that she would "do anything to be able to move into [her] father's house." Although Tekiara's testimony that she was "happy" living with her mother did not support Allen's theory of the case, Allen does not show prejudice. Indeed, there is every reason to expect that the prosecutor would have elicited this information on redirect-examination as shown by the questions he asked Shalisia on redirect:

> Q. Miss B[.], how come you don't like living with John Allen?

A. Because of this incident [sexual contact], you know.

….

Q. Other times he would touch you in a sexual manner?

A. Yes.

Q. And that's why you didn't want to live with him?

A. Yes.

¶13 Allen's attorney also called Bobby B. as a defense witness to support the defense theory. Bobby B. admitted that he wanted primary placement of Shalisia. He denied, however, that he told Shalisia to accuse Allen of sexually assaulting her to gain primary physical placement. Although Bobby B.'s denial did not support the defense theory, Allen again fails to show that Bobby B., clearly an unfriendly witness, would not have testified otherwise on redirect examination.

¶14 In the postconviction motion, Allen also used his trial counsel's examination of Bobby B. as an example of how counsel was not prepared for trial. As noted, Allen's trial counsel called Bobby B. as a witness to support the theory that Bobby B. told the children to lie about the sexual assaults to gain primary physical placement of his children. During direct examination, Allen's attorney asked Bobby B. if he had written a letter to the Sensitive Crimes Unit of the Milwaukee Police Department reporting that Allen sexually assaulted his daughters. Bobby B. claimed that he never wrote a letter: "I haven't sent a letter anywhere. I haven't written a letter." Allen claimed that his trial counsel should have been prepared to produce the alleged letter or a witness to challenge Bobby B.'s response. This allegation is conclusory and undeveloped. Allen does not beyond mere assertion show that the alleged letter even exists. Thus, he fails to support his claim with any evidence to show that his attorney was unprepared

because he did not produce the letter, which Allen has also not produced. *See* ***Flynn***, 190 Wis. 2d at 48, 527 N.W.2d at 349–350.

¶15 Allen further claims that his trial counsel should have filed a motion for an *in camera* inspection of records to determine whether they contained exculpatory information. A defendant may obtain an *in camera* review of privileged records upon a preliminary showing that "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." ***Green***, 253 Wis. 2d 356, ¶¶21, 34; *see also* ***Shiffra***, 175 Wis. 2d at 605, 499 N.W.2d at 721. We independently review whether the defendant has made the preliminary evidentiary showing necessary for an *in camera* review of a victim's privileged records. ***Green***, 253 Wis. 2d 356, ¶20.

¶16 Allen fails to meet the preliminary ***Shiffra-Green*** materiality test. As noted, this test is used to determine if there should be an *in camera* inspection of confidential or privileged documents, not documents in general. Allen does not allege that any privileged or confidential documents existed. Moreover, Allen fails to show that the alleged documents contain relevant information necessary to a determination of guilt or innocence. He submits: "The issue of defending allegations of sexual assault of a child, and the reasons and motives why a child(ren) might fabricate such allegations, are the basis upon which an accused's right to file a Schiffra motion has been established." (Parentheses and underlining in original.) This is not enough to meet his burden under ***Schiffra*** and ***Green***.

¶17 The record conclusively demonstrates that Allen is not entitled to relief. Thus, the trial court did not erroneously exercise its discretion when it

denied his ineffective-assistance-of-counsel claims without a ***Machner*** hearing. *See* ***Bentley***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53.

*B. Interest of Justice*

¶18 Finally, Allen asks this court to order a new trial in the interest of justice on the ground that the real controversy was not fully tried. *See* WIS. STAT. § 752.35. He cites to the cumulative effect of the errors we discussed above to support his claim. Since we have rejected all of Allen's arguments, we decline to order a new trial. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976).

*By the Court.*—Judgment and order affirmed.

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