COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2845 **Cir. Ct. No. 2003CF4783**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEARON DUVALL TRUSS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Learon Duvall Truss, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 motion without a hearing. Truss alleged that postconviction counsel should have challenged trial counsel's failure to raise

issues regarding multiplicity, destruction of evidence, and the confrontation clause. We conclude the circuit court properly denied the motion, and we affirm.

BACKGROUND

¶2 An amended Information charged Truss with six counts of armed robbery with the threat of force, as party to a crime; two counts of attempted armed robbery with the threat of force, as party to a crime; one count of kidnapping, while armed, as party to a crime; one count of kidnapping, while armed; seven counts of first-degree sexual assault, while armed; and one count of misdemeanor possession of marijuana. A jury convicted Truss on all but three of the armed robbery charges and one of the sexual assault charges. The circuit court imposed a sentence of 163 years' initial confinement and fifty-five years' extended supervision. Truss filed a postconviction motion, which was denied. He appealed, raising ineffective assistance of trial counsel for failure to call three alibi witnesses. We affirmed. *See* ***State v. Truss***, No. 2006AP1508-CR, unpublished slip op. (WI App Aug. 28, 2007).

¶3 On November 14, 2011, Truss filed a *pro se* postconviction motion, pursuant to WIS. STAT. § 974.06, seeking to vacate his conviction. He complained that he had been "convicted of multiple counts which constituted a single offense" in violation of double jeopardy protections; that his convictions "were obtained by the destruction of exculpatory evidence"; that his convictions "were obtained by use of testimonial hearsay statements"; and that he was denied the effective assistance of trial counsel because trial counsel did not raise issues regarding the evidence or the hearsay. Truss further alleged that postconviction counsel was ineffective for not raising these claims of ineffective trial counsel. The circuit court reviewed the motion and concluded it was meritless; thus, neither trial

counsel nor postconviction counsel was ineffective for not pursuing those issues. Truss appeals.

DISCUSSION

A. Standards of Review

¶4 To be entitled to a hearing on a postconviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. If the motion does allege sufficient facts, a hearing is required. ***Ibid.*** If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. ***Ibid.***

¶5 A motion brought under WIS. STAT. § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he did not, or could not, raise the issues in a motion preceding the first appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994).[1] Claims of ineffective assistance of trial counsel "cannot be reviewed on appeal

[1] The State recommends that we affirm based on ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994), because Truss's issues were not raised in his first appeal. However, this position ignores Truss's argument that ineffective postconviction counsel constitutes a sufficient reason for avoiding the ***Escalona*** bar under ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996). We decline to apply the ***Escalona*** bar in this case.

Truss, for his part, responds that the State should be foreclosed from making this argument because it was not first raised in the circuit court. Truss is incorrect: a respondent may make any argument on appeal that supports upholding the circuit court's decision, whether or not it has been previously raised. *See* ***State v. Holt***, 128 Wis. 2d 110, 124–125, 382 N.W.2d 679, 686–687 (Ct. App. 1985).

absent a postconviction motion in the trial court." ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677–678, 556 N.W.2d 136, 137 (Ct. App. 1996). Thus, ineffective assistance of *postconviction* counsel may sometimes constitute a sufficient reason for not raising an issue on direct appeal. *See* ***id.*** at 382, 556 N.W.2d at 139.

¶6 However, an attorney is not ineffective for failing to pursue a meritless issue. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406, 416 n.10 (1996); ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235, 246–247 (1987). Thus, to show that postconviction counsel was ineffective for not challenging trial counsel's performance and thus be entitled to relief, Truss must demonstrate that trial counsel actually was ineffective.[2] *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375.

¶7 To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency prejudiced the defendant. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 126, 700 N.W.2d 62, 70. To prove deficiency, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Ibid.*** To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. ***Ibid.*** If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Strickland v.***

[2] The test is not, as Truss asserts, whether the new issues he raises are clearly stronger than the ones counsel actually did raise. This test, as set forth in ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986) is applicable to certain claims of ineffective assistance of *appellate* counsel, an issue not before us in this appeal.

Washington, 466 U.S. 668, 697 (1984). The defendant bears the burden to show both elements. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 278, 647 N.W.2d 441, 445.

B. Double Jeopardy

¶8 The amended Information alleged seven counts of first-degree sexual assault while armed, contrary to WIS. STAT. § 940.225(1)(b). Six of those counts involved victim K.S., and alleged two counts of finger-to-vagina intercourse, two counts of gun-to-vagina intercourse, one count of gun-to-anus intercourse, and one count of penis-to-mouth intercourse. These charges all stemmed from Truss's encounter with K.S. in her brother's truck. Truss's multiplicity challenge is essentially a claim that the evidence, which he believes establishes a timeline in which the perpetrator had one to three minutes to assault K.S., does not support charging him with more than a single count of assault.

¶9 "The double jeopardy clauses of the federal and state constitutions are 'intended to provide three protections[,]'" only one of which is relevant here: "protection against multiple punishments for the same offense." *See* ***State v. Derango***, 2000 WI 89, ¶26, 236 Wis. 2d 721, 739, 613 N.W.2d 833, 841 (citation omitted). Multiplicity challenges fall into this category, and usually arise in one of two ways: when a single course of conduct is charged in multiple counts of the same statutory offense, also called "continuous offense" cases, or when a single criminal act encompasses the elements of more than one distinct statutory crime. *See* ***id.***, 2000 WI 89, ¶27, 236 Wis. 2d at 739, 613 N.W.2d at 841–842.

¶10 "[B]ecause double jeopardy protection prohibits double punishment for the 'same offense,' the focus of the inquiry is whether the 'same offense' is actually being punished twice[.]" ***Id.***, 2000 WI 89, ¶28, 236 Wis. 2d at 740, 613

N.W.2d at 642. We employ a two-part test for reviewing multiplicity challenges: in step one, we determine whether the offenses are identical in law and fact, and in the second part, which we reach only if the offenses are not identical in law and fact, we inquire into legislative intent. *See* ***State v. Koller***, 2001 WI App 253, ¶29, 248 Wis. 2d 259, 278, 635 N.W.2d 838, 848. If the offenses are different in law or fact, then there is a presumption that multiple punishments were intended. ***Ibid.*** This presumption may be rebutted only by showing clear legislative intent to the contrary. ***Ibid***.

¶11 This case presents a "continuous offense" challenge because Truss was charged with multiple violations of WIS. STAT. § 940.225(1)(b). We need only consider whether the charges are identical in fact.[3] ***Koller***, 2001 WI App 253, ¶30, 248 Wis. 2d at 278, 635 N.W.2d at 848. This inquiry involves "a determination of whether the charged acts are 'separated in time or are of a significantly different nature.'" ***Id.***, 2001 WI App 253, ¶31, 248 Wis. 2d at 278, 635 N.W.2d at 848 (citation omitted).

¶12 Even the same types of acts—*i.e.*, multiple sexual assaults—are different in nature if each one requires "a new volitional departure in the defendant's course of conduct." ***Id.***, 2001 WI App 253, ¶31, 248 Wis. 2d at 279, 635 N.W.2d at 849 (citations and internal quotation marks omitted). Time is an important factor in this determination, but a brief time separating acts, even mere seconds, may suffice. ***Ibid.*** "The pertinent time question is whether the acts

[3] Truss does not attempt to overcome the presumption of multiple punishments. *See* ***State v. Koller***, 2001 WI App 253, ¶30, 248 Wis. 2d 259, 278, 635 N.W.2d 838, 848.

indicate the defendant had 'sufficient time for reflection between the assaultive acts to again commit himself.'" ***Ibid.*** (citations and quotation marks omitted).

¶13 Truss's challenge here fails for multiple reasons. First, a multiplicity challenge was actually made by trial counsel. The original complaint alleged two counts of assault against K.S.; trial counsel objected when the amended information added four more. The trial court concluded that there was sufficient time for reflection between each act, so the charges were not multiplicitous.[4] In rejecting Truss's WIS. STAT. § 974.06 motion, the circuit court noted this prior ruling, noted that Truss had not shown that any other multiplicity challenge could succeed, and concluded that Truss had not shown that the evidence from trial was insufficient to justify charging his conduct as multiple offenses.

¶14 We agree with the circuit court. Whether it takes the one to three minutes Truss suggests is supported by the Record, or twenty minutes as K.S. testified, "[w]hen a perpetrator moves from having [finger]-to-vagina [intercourse] to having [gun]-to-vagina intercourse, he necessarily engages in a new volitional act warranting a separate charge, conviction, and punishment." *See* ***Koller***, 2001 WI App 253, ¶59, 248 Wis. 2d at 292, 635 N.W.2d at 855. Here, Truss's assault alternated through various types of sexual intercourse, each constituting a new volitional act. Accordingly, the Record conclusively reveals that there was no

[4] "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991).

basis for trial counsel to pursue a further multiplicity challenge, and no basis for postconviction counsel to challenge trial counsel's performance.[5]

C. Destruction of Evidence

¶15 Truss also alleged that trial counsel should have challenged the police decision to return to K.S. the truck in which he assaulted her. He contends that by doing so, and by police not conducting enough of a search of the truck to find fibers, hairs, or other evidence, "his conviction was obtained by the destruction of exculpatory evidence."

¶16 To rise to the level of a due process violation, "evidence not preserved, lost or destroyed by the State 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294, 297 (Ct. App. 1994) (citation omitted). In addition, there is a difference between evidence that is potentially useful and evidence that is exculpatory. ***Ibid.*** A defendant's due process rights are violated if police: "(1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." ***Ibid.***

¶17 Truss does not identify any police failure to preserve "apparently exculpatory" evidence. He complains that police merely examined the truck cab

[5] To the extent that Truss has also attempted to raise a sufficiency-of-the-evidence challenge generally, we decline to address it because it is undeveloped. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142–143 (Ct. App. 1987).

with a flashlight, not with any special equipment. He also asserts that police should have examined the truck more closely for "any seminal fluids, hair or clothing fibers" because "[t]he only evidence in this case that would prove who the assailant was" was in the truck. However, Truss's contention that the truck held exculpatory evidence is speculative at best. He assumes that: (1) a more thorough search actually would have uncovered other evidence, and (2) that such evidence would have excluded him as K.S.'s assailant. However, he alleges no basis for these beliefs.

¶18 Further, Truss does not identify how police may have acted in bad faith by failing to preserve "potentially exculpatory" evidence. There is no bad faith if police negligently, inadvertently, or carelessly failed to preserve evidence which is merely potentially exculpatory. ***Id.***, 189 Wis. 2d at 68, 70, 525 N.W.2d at 297–298. Moreover, even if the truck held other DNA or semen, or if it held no other DNA or biological material, the truck was emphatically not the only source of evidence for proving the identity of K.S.'s assailant.[6] Truss's DNA was found in semen on K.S.'s pullover and in her mouth, and her DNA was found in "very large quantity" on the gun Truss used to assault her. Further, K.S. identified Truss as her assailant through a lineup and testified about her ordeal at trial. Accordingly, Truss presents only conclusory allegations about this error and has not sufficiently pled ineffective assistance of either counsel.

[6] It is logical to assume that there may have been at least one other source for DNA in the truck because K.S.'s brother owned the vehicle. The presence of the owner's DNA, however, is not exculpatory.

D. Confrontation

¶19 Truss also believes that trial counsel should have objected, on confrontation grounds, to the fact that armed robbery victim Denice Rinehart and attempted armed robbery victim Dale Price did not testify at his trial. He also complains about indirect testimony of Karen Nau on behalf of Rinehart, N.L. on behalf of Price, and Detective Sean Lips on behalf of Christy Fields.[7]

¶20 The confrontation clause guarantees criminal defendants the right to confront the witnesses against them. ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 606, 691 N.W.2d 637, 644. However,

> the right of confrontation does not require the state to produce any particular witness or give the accused the right to insist that the state call any particular witness…. Not even the victim, or the accuser in the sense of the person swearing to the complaint which becomes the basis for the arrest, need be called as a witness…. The constitutionally guaranteed right of confrontation applies in relation to the giving of testimony which is considered by the trier of the fact on the issue of the accused's guilt.

State v. LaTender, 86 Wis. 2d 410, 434, 273 N.W.2d 260, 271 (1979) (quoting ***Gaertner v. State***, 35 Wis. 2d 159, 166, 150 N.W.2d 370, 374 (1967)) (ellipses in ***LaTender***; quotation marks omitted). Thus, there was no basis for trial counsel to challenge Rinehart's or Price's absence from trial on confrontation clause grounds.

¶21 Truss also complains on hearsay grounds that the district attorney asked Nau, who was with Rinehart at the time of the robbery and therefore a victim herself, "Did it appear to you, based on what you were observing that Ms. Rinehart was wanting to give her property to Mr. Truss?" Nau answered that

[7] N.L. was the victim in the seventh sexual assault count.

question, "No." However, hearsay "is a *statement*, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3) (emphasis added). Truss has not identified a portion of Nau's testimony where she told the jury what Rinehart said; rather, Nau testified about her own observations during the course of the robbery.

¶22 Truss also complains on hearsay grounds about N.L.'s testimony that Price "emptied out his cigarettes, his light, threw them on the ground. He said I don't have anything. He'd—like, you can have my cigarettes. You can take them. I don't have anything." N.L. was with Price during the attempted robbery and she, too, was a robbery victim. She could testify about her observations of Price throwing things on the ground. Admission of the particular portion of her testimony that Truss challenges, assuming it was hearsay, was harmless: it in no way implicates Truss and is wholly inconsequential in light of other evidence.[8]

¶23 Finally, Truss complained:

> Christy Fields made a statement to Detective Sean Lips. Her alleged statement accused Mr. Truss as being the caller who left a message on her voice mail from the armed robbery of Ms. Rinehart, which also related the attempted armed robbery of Mr. Price. Christy Fields never testified at Mr. Truss's trial. Mr. Truss never had a prior opportunity to cross-examine Christy Fields. Instead Detective Sean Lips testified for Christy Field's [*sic*] who was not present at Mr. Truss's trial. Christy Fields testimony was the sole reason for the arrest of Mr. Truss.

[8] Specifically, three victims identified Truss in a line-up, and Truss admitted being at all of the crime scenes.

In other words, Truss's contention is that Christy Fields, when she identified Truss by name, was the only person who had been able to give police a sufficient lead to work with in identifying a suspect from which they could build their lineups and, ultimately, secure his arrest. Truss, however, appears to misunderstand the series of events leading to his arrest.

¶24 Several robbery victims had their phones stolen. Police were able to track calls made from the phones. One call was placed to Christora Fields, a girlfriend of Truss's, but that call was forwarded to her sister Christy Fields' home, where Truss left a message that mentioned the robberies in some fashion. Police interviewed Christora, who identified the caller as "Lorenzo." Christy had been unable to identify the voice on the phone but she did identify "Lorenzo" as Truss when Christora denied knowing "Lorenzo's" real name. Thus, to the extent that Truss is complaining about Christy identifying his voice, he condemns the wrong sister. Further, it was not Christy's *testimony* that led to his arrest: rather, it was her statement to police over the course of their investigation. There is no hearsay objection to be made to police use of that statement.

¶25 Detective Lips did testify about interviewing the Fields sisters. When he attempted to testify about Christy identifying "Lorenzo" as Truss, trial counsel objected on hearsay grounds. The circuit court sustained the objection.

¶26 Based on the foregoing, Truss has alleged, and the Record reveals, no basis for trial counsel to have raised confrontation clause challenges. Trial counsel objected to the only potentially detrimental hearsay testimony Truss has specifically identified, which would indicate that trial counsel did not perform deficiently. Accordingly, there was no basis on which postconviction counsel could have made a challenge to trial counsel's performance in this regard.

¶27 To conclude, Truss's postconviction motion failed to allege sufficient facts that, if true, would entitle him to relief. Further, the Record demonstrates that trial counsel was not ineffective. Accordingly, the circuit court properly exercised its discretion when it denied Truss's motion without a hearing.

By the Court.—Order affirmed.

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