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DISTRICT II

December 17, 2025

To:

Hon. J. Arthur Melvin III
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Erica L. Bauer
Electronic Notice

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

2024AP663-CR State of Wisconsin v. Jubre T. Miller (L.C. #2021CF1642)

Before Gundrum, Grogan, and Lazar, 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).

Jubre T. Miller appeals from the judgment convicting him of second-degree sexual assault of a child under the age of 16, as a repeater, and the order denying his postconviction motion. Miller argues that trial counsel was ineffective for not investigating and calling a witness at trial to impeach the credibility of an eyewitness. He further argues that the circuit court erred in denying his motion for a new trial due to newly discovered evidence. He also seeks a new trial in the interest of justice. 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 (2023-24).[1] We summarily affirm.

The facts pertinent to this appeal, both undisputed and limited, were found by the circuit court after the postconviction evidentiary hearing. After a two-day jury trial, Miller was convicted of sexually assaulting 13-year-old Khardi.[2] Khardi testified at the trial, as did an eyewitness, Melissa Olender. Olender, who rented the apartment where the sexual assault occurred, testified she had left Khardi alone with Miller at the apartment for several hours because Olender had a job interview at a restaurant, and there was no one else but Miller to watch Khardi. Miller initially planned to testify at trial in his own defense, but ultimately decided not to testify or present any defense witnesses.

After the trial, Miller submitted to the circuit court an investigator's report indicating that Olender's trial testimony regarding the job interview had been untrue—the manager of the restaurant had no record of any interviews taking place on the day of the assault or of Olender ever having interviewed there. The report had been prepared by an investigator in the office of the attorneys who represented Miller in his related revocation action (the revocation attorneys). Miller filed a postconviction motion seeking a new trial. He alleged that his trial counsel had been ineffective for failing to investigate and failing to call the restaurant manager at trial to impeach Olender's testimony.

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

[2] To protect the victim's privacy, we refer to her using the pseudonym chosen by the parties.

Based on the allegations in Miller's postconviction motion, the circuit court held an evidentiary hearing at which Miller, his trial counsel, and his revocation attorneys testified. Trial counsel testified that he had limited time to prepare for trial because Miller insisted on holding the court to his speedy-trial demand. The court found that Miller had insisted on proceeding to trial quickly, both at his own peril and well aware of the risks. For example, the court observed that counsel had filed notice of an alibi witness as soon as Miller told counsel of the witness, but the notice was not within the 30-day requirement of WIS. STAT. § 971.23(8). The court specifically found that before trial, it had "discussed the notice of alibi not being timely, on the record with [Miller], including giving him the option to push the trial back a few weeks to allow this witness to testify[, but Miller] declined this option." The court found that Miller had chosen to forego the potential of using certain evidence at the trial or having items tested prior to trial in favor of sticking to the originally-scheduled, speedy trial.

In a written decision, the circuit court rejected Miller's claims of error and denied his motion for a new trial. The court found that the revocation attorneys had told Miller about the information in the report prior to the trial. Thus, it was not newly discovered evidence warranting a new trial.

The revocation attorneys also testified at the postconviction hearing that there also had been some communications between them and Miller's trial counsel, but that communication did not include any discussion regarding the report. However, the circuit court found that trial counsel did not perform deficiently. It explicitly found that Miller "had knowledge and rather than share the information, he simply told [trial counsel] to talk to his [revocation attorneys]." The court further found that counsel followed Miller's instructions and spoke to the attorneys, "but was never told about the investigation into Ms. Olender by those attorneys." Thus, because

counsel could "not ask about something he does not know about," he did not perform deficiently and was not ineffective. Miller appeals.

Miller renews his postconviction arguments on appeal, focusing primarily on trial counsel's alleged ineffectiveness in failing to properly investigate and failing to call the restaurant manager to impeach Olender's testimony. Our analysis of his claims involves the familiar two-pronged test: the defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "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 omitted).

"A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one." ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854. "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

Even if we assume, without deciding, that trial counsel performed deficiently in failing to investigate and call the restaurant manager at trial, we conclude that Miller cannot establish prejudice from the lack of having, as impeachment evidence, the report or the restaurant manager's testimony. Miller does not demonstrate that where Olender was before she returned

to her apartment and interrupted Miller's assault of a 13-year-old girl affects her testimony about what she saw when she walked in. Miller has failed to explain why the jury, which heard Khardi's description of how and where Miller sexually assaulted her and Olender's corroborating testimony, would have changed its tune and acquitted Miller, had it learned that Olender had not been at a job interview, but was somewhere else away from the apartment. Whether Olender left Miller in charge of Khardi to attend a job interview or simply because she wanted to leave the apartment had no bearing on Khardi's testimony, nor did it even affect Olender's report that she returned to the apartment to catch Miller finishing up with his sexual assault of Khardi.

Additionally, Miller's theory of defense was that he was not present at the apartment on the day the assault occurred. That is exactly what he told police and trial counsel. During the trial, Miller told the circuit court he wished to testify and that his testimony would be that he was elsewhere that day. Miller then reversed course when the court informed him that the State could use, in rebuttal, two traffic citations issued to Miller on the day of the assault, just blocks away that police found in the apartment. Critical to our analysis, Miller does not explain how Olender's presence, or absence, at a job interview at a particular restaurant would have changed Miller's decision not to testify, Miller's defense, or, of key significance, the outcome of Miller's trial. *See, e.g.*, ***Love***, 284 Wis. 2d 111, ¶30.

Simply put, it would not have mattered to the jury's verdict if it had learned that Olender had not been at a job interview but instead had been having coffee with a friend, for example. Khardi's testimony would have been unchanged; Olender's testimony about walking into her apartment on the tail-end of a sexual assault would have been unchanged; Miller's defense would have been unchanged, including its attacks on Olender's character; and, finally, the outcome of

the trial would have been unchanged. *See* ***id.*** Because he has failed to demonstrate prejudice, Miller cannot establish ineffective assistance of counsel.[3]

Miller's second argument, that the investigative report prepared for his revocation attorneys is newly discovered evidence warranting a new trial, is refuted by the Record and his own testimony at the evidentiary hearing. He testified that he knew about the report by late January, over a month before his trial began, and that he instructed his revocation attorney to send the report to his probation agent, which she did a month before his trial, but not to his trial counsel. The circuit court explicitly found that Miller knew before the trial of the information that could have impeached Olender's statement. That is the precise opposite of "newly discovered" evidence. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). Therefore, the court did not err in its ruling on this allegation.

Finally, Miller seeks discretionary reversal under WIS. STAT. § 752.35. This court may exercise its authority under that statute whenever the real controversy has not been fully tried or whenever it is probable that justice has for any reason miscarried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). For the reasons articulated above, Miller argues the real controversy about Olender's credibility as an eyewitness was not fully tried, and justice has miscarried. We exercise our power of discretionary reversal sparingly, and "only in exceptional cases." ***Id.*** at 11. Having rejected Miller's arguments that the circuit court erred in finding no

[3] Because Miller cannot prove prejudice related to his argument that trial counsel failed to investigate and impeach Olender's testimony with the manager's statement, we need not analyze the deficiency prong. *See* ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854. We further observe that we may affirm a circuit court decision based on different reasoning than that court. *See, e.g.*, ***State v. Trecroci***, 2001 WI App 126, ¶45, 246 Wis. 2d 261, 630 N.W.2d 555 (we may affirm a circuit court's ruling on different grounds).

ineffective assistance of counsel and no newly discovered evidence, we conclude this is not an exceptional case warranting the exercise of our discretionary reversal authority.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals