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**DISTRICT I**

October 3, 2023

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

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2022AP1284

State of Wisconsin v. Roberto Cornejo (L.C. # 2016CF1413)

Before White, C.J., Donald, P.J., and Dugan, J.

**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).**

Roberto Cornejo appeals the order of the circuit court denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2021-22).<sup>1</sup> 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(1). We summarily affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In October 2016, Cornejo was convicted after a jury trial of two counts of first-degree sexual assault of a child. The assaults occurred around January 1985, when the victim—Cornejo’s niece—was eleven years old, while Cornejo was living with her family. The victim had become pregnant as a result of the assaults, and had an abortion in April 1985.

Shortly before the victim’s abortion was performed, Cornejo went to Mexico, and subsequently relocated to Michigan. A warrant was issued; Cornejo was arrested in Laredo, Texas in June 2016, and brought to Milwaukee for trial. After being convicted by the jury, he was sentenced in October 2016 to thirty years of imprisonment.

Cornejo filed a postconviction motion under WIS. STAT. RULE 809.30. He argued that his trial counsel was ineffective for (1) failing to properly investigate why he went to Mexico, which he claimed was to clear up his immigration status, as opposed to fleeing the country; (2) failing to object to the introduction of the victim’s medical records showing that she was pregnant and had an abortion when she was eleven years old, on the grounds that they lacked probative value and were unfairly prejudicial; and (3) failing to object during the prosecutor’s closing argument for alleged improper use of the victim’s medical records, specifically an observation that the medical records indicated that the victim had told her healthcare provider that her pregnancy was the result of an assault by her uncle. Additionally, Cornejo argued plain error regarding that medical record reference by the prosecutor. Cornejo also sought a new trial in the interests of justice. This court rejected all of Cornejo’s claims and affirmed his convictions. *See State v. Cornejo*, No. 2019AP464-CR, unpublished slip op. ¶1 (WI App May 27, 2020).

Cornejo then filed the WIS. STAT. § 974.06 motion that underlies this appeal in December 2021. Cornejo again made several claims of ineffective assistance by his trial

counsel; specifically, for (1) failing to object to the admission of the victim’s medical records on Confrontation Clause grounds; (2) failing to move for a mistrial after a witness mentioned that Cornejo was brought back to Wisconsin via a prisoner transport service; (3) failing to move for a mistrial when other-acts evidence was elicited by the prosecutor from the victim’s younger sister during her testimony; and (4) failing to conduct any “meaningful investigation” of the case. He also claimed that these errors led to cumulative prejudice. Furthermore, he argued that his postconviction counsel was ineffective for failing to raise these arguments.<sup>2</sup>

The circuit court rejected Cornejo’s arguments stating that they were conclusory, and that Cornejo “fail[ed] to engage in a meaningful comparative analysis of his current claims relative to the claims that postconviction counsel actually raised.” Therefore, the court found that Cornejo failed to demonstrate that his current claims are clearly stronger. As a result, the court denied his WIS. STAT. § 974.06 motion. Cornejo appeals.

Once the right to a direct appeal has been exhausted, WIS. STAT. § 974.06 is the mechanism for a defendant to bring constitutional claims. *See State v. Henley*, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. An ineffective assistance of counsel claim is a constitutional issue that may be properly brought under a § 974.06 motion. *State v. Balliette*, 2011 WI 79, ¶34,

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<sup>2</sup> Throughout his WIS. STAT. § 974.06 motion and appellate briefs, Cornejo refers to the ineffective assistance of both postconviction counsel *and* appellate counsel. As the circuit court pointed out in its decision denying this motion, any ineffective assistance claims Cornejo has against his *appellate* counsel must be brought by filing a petition with this court pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), not via a § 974.06 motion. The claims that Cornejo has brought in his § 974.06 motion are premised on the conduct of trial counsel; thus, his § 974.06 motion is the proper vehicle for these claims. *See State ex rel. Warren v. Meisner*, 2020 WI 55, ¶36, 392 Wis. 2d 1, 944 N.W.2d 588 (“If the acts or omissions that constitute alleged ineffective assistance of counsel took place in the circuit court, then the circuit court is the proper forum for such claims to be filed in the first instance.”). We further note that the same attorney represented Cornejo for his postconviction motion and his appeal in *State v. Cornejo*, No. 2019AP464-CR, unpublished slip op. (WI App May 27, 2020).

336 Wis. 2d 358, 805 N.W.2d 334. That said, a defendant is precluded from raising any claim—including an ineffective assistance claim—in a § 974.06 motion if that claim could have been brought on direct appeal, *see State v. Escalona-Naranjo*, 185 Wis. 2d 168, 173, 517 N.W.2d 157 (1994), unless he or she can demonstrate that the claim is “clearly stronger” than the claims appellate counsel previously brought, *see State v. Romero-Georgana*, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668. This is determined by “compar[ing] the arguments now proposed against the arguments previously made.” *See id.*, ¶46. If the defendant cannot establish that a claim brought under § 974.06 is clearly stronger, then the claim is procedurally barred. *Romero-Georgana*, 360 Wis. 2d 522, ¶5. “Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law” that we review *de novo*. *Romero-Georgana*, 360 Wis. 2d 522, ¶30.

Additionally, a claim of ineffective assistance of counsel requires that a postconviction evidentiary hearing be held “to preserve the testimony of trial counsel.” *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a defendant is not automatically entitled to an evidentiary hearing relating to his or her postconviction motion. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If sufficient facts are alleged in the motion, the circuit court must hold an evidentiary hearing. *Romero-Georgana*, 360 Wis. 2d 522, ¶30. Whether a WIS. STAT. § 974.06 motion alleges sufficient facts to require a hearing is a question of law that we review *de novo*. *Romero-Georgana*, 360 Wis. 2d 522, ¶30.

However, if the WIS. STAT. § 974.06 motion “does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to

grant or deny a hearing.” *Romero-Georgana*, 360 Wis. 2d 522, ¶30 (citations omitted). This court reviews that discretionary decision under the erroneous exercise of discretion standard. *Id.*

We conclude that Cornejo’s motion is insufficiently pled. First, Cornejo’s arguments primarily discuss the merits of his current claims, and provide no meaningful comparison demonstrating why those current claims are clearly stronger than the claims previously raised in his direct appeal. *See id.*, ¶46. Rather, he just makes general, conclusory statements that his current claims are clearly stronger. *See id.*, ¶30.

Furthermore, Cornejo fails to demonstrate that his trial counsel was ineffective, as required to establish that his postconviction counsel was ineffective for failing to bring his current claims. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. To prove ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant “must prevail on both parts of the test to be afforded relief.” *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

To be sufficiently pled, such that an evidentiary hearing is warranted, an ineffective assistance of counsel claim set forth in a WIS. STAT. § 974.06 motion must be pled with “particularity” to provide a “clearly articulated justification” for holding a hearing. *Balliette*, 336 Wis. 2d 358, ¶¶40, 58. Indeed, a § 974.06 motion must “make the case” for an ineffective assistance of counsel claim in order to be deemed sufficiently pled. *See Balliette*, 336 Wis. 2d 358, ¶67.

Here, Cornejo’s pleadings do not sufficiently demonstrate that he was prejudiced by the current alleged deficiencies of his trial counsel. *See Romero-Georgana*, 360 Wis. 2d 522, ¶30.

To prove 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.” *Strickland*, 466 U.S. at 694. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.*

However, Cornejo again makes only general, conclusory statements that the alleged deficiencies set forth in his current ineffective assistance claims were prejudicial. In contrast, the State thoroughly analyzes each of Cornejo’s claims, pointing out that Cornejo failed to establish—or, at times, even argue—the prejudice prong of *Strickland* for each of his claims. In short, the State asserts that Cornejo’s failure to establish a viable claim of ineffective assistance of counsel, as well as his failure to sufficiently analyze his claims under the clearly stronger standard, are fatal to his WIS. STAT. § 974.06 motion.

We agree. Moreover, in his reply brief, Cornejo does not directly respond to the State’s assertions regarding the insufficiencies in his motion. We may deem unrefuted arguments as being conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Therefore, because Cornejo did not raise sufficient facts to demonstrate that he was entitled to relief and presented only conclusory statements regarding the clearly stronger standard, the circuit court did not err in denying his WIS. STAT. § 974.06 motion without an evidentiary hearing. See *Romero-Georgana*, 360 Wis. 2d 522, ¶30. Accordingly, we affirm.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. See WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*