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DISTRICT I

June 4, 2024

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

2023AP298-CR

State of Wisconsin v. Hector O. Borges (L.C. # 2017CF2337)

Before White, C.J., Geenen and Colón, 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).

Hector O. Borges appeals from a judgment convicting him of first-degree sexual assault of a child under the age of twelve. He also appeals from the order denying his postconviction motion for 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 (2021-22).¹

On May 17, 2022, the State charged Borges with first-degree sexual assault of a child under the age of twelve. According to the complaint, Borges placed his penis in the mouth of his

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

then-girlfriend's child, J.C., while showering with J.C. J.C.'s mother called and confronted Borges about the assault while Borges was incarcerated for an unrelated crime. The conversation was recorded. Borges initially denied sexually assaulting J.C., but admitted to showering with her.

The complaint further states that following the allegations, Detective Steve Wells conducted a *Mirandized*² interview with Borges, in which Borges admitted to the assault. Police also conducted a forensic interview with J.C., in which she described Borges putting "his thing" in her mouth pretending it was candy.

The matter proceeded to trial where the jury heard Borges's confession, viewed J.C.'s forensic interview, and heard testimony from the detective who listened to the recorded jail calls between Borges and J.C.'s mother. The jury also heard testimony from multiple other witnesses, including J.C.'s mother. During cross-examination of J.C.'s mother, trial counsel asked "Was there ever a time where you tried to put a case on Mr. Borges?" The trial court immediately held a discussion with the attorneys outside of the presence of the jury. Trial counsel told the trial court that he "learned [that day] that there may be a letter that [the mother] wrote after initiating criminal allegations against Mr. Borges; and then ... a letter recanting those allegations, saying that she lied." Trial counsel told the trial court that the matter involved an unrelated domestic violence allegation for which Borges was charged in a separate case, but that the charge was dismissed and read in. The trial court ultimately found that any evidence pertaining to the mother's alleged recantation letter was inadmissible, stating "we're not going to have a mini trial

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

within this trial about whether or not he battered her and whether her initial allegations were true or false.” The trial court noted that the risk of confusion of the issues substantially outweighed any probative value the evidence had to the mother’s credibility.

The jury ultimately found Borges guilty as charged. The trial court sentenced Borges to thirty-four years of imprisonment, bifurcated as twenty-five years of initial confinement and nine years of extended supervision.

Borges then filed a postconviction motion seeking a new trial. As relevant to this appeal, Borges argued that the trial court erroneously exercised its discretion when it deemed the recantation evidence inadmissible. Borges also argued that his trial counsel was ineffective for: (1) failing to investigate the recantation letter; (2) failing to review the recorded jail phone calls between Borges and the child’s mother prior to trial; and (3) failing to retain an expert witness “to provide [the] jury with additional information on [J.C.’s] delayed reporting of the assault, on the interviewing techniques used by the State, and to assist the jury in making its own decision regarding the credibility of the child victim and her mother.” The postconviction court denied the motion without a hearing. This appeal follows.

On appeal, Borges contends that the trial court erred in deeming the alleged recantation letter inadmissible and that his trial counsel rendered ineffective assistance. Specifically, Borges contends that trial counsel lied to the trial court when he claimed that he learned of the recantation letter in the middle of the trial and that the court’s decision was therefore “hampered by [the] lack of an actual recantation letter, and [the court used] facts supplied by ill-prepared defense counsel.” Borges also reiterates that his trial counsel rendered ineffective assistance by failing to investigate the letter, failing to review discovery, and failing to call an expert witness to

analyze J.C.’s forensic interview. Borges contends that an evidentiary hearing is warranted on all of his claims. We disagree.

“A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. “Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*.” *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). “[I]f the 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 postconviction court has discretion to deny a postconviction motion without a hearing. *Allen*, 274 Wis. 2d 568, ¶9. We review the postconviction court’s decision under the erroneous exercise of discretion standard. *See id.*

With regard to the admissibility of the recantation letter, we agree with the postconviction court that the trial court did not erroneously exercise its discretion in rendering the letter inadmissible. Trial courts have broad discretion in making evidentiary rulings, and we review their decisions to admit or exclude evidence using the erroneous exercise of discretion standard of review. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Under that standard, we will uphold a trial court’s evidentiary ruling as long as the court examined the relevant facts, applied a proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. *Id.*

Relevant evidence is generally admissible, *see* WIS. STAT. § 904.02, but may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” WIS. STAT. § 904.03.

Here, the trial court recognized that the evidence was relevant to J.C.’s mother’s credibility, but it found that the prejudice resulting from delving into the recantation evidence would have outweighed its probative value. Specifically, the trial court stated that addressing the recantation would lead to a mini trial on the domestic violence incident underlying the letter and would confuse the issues for the jury. Moreover, as the postconviction court noted, “[t]he recantation letter from the victim’s mother in an unrelated case does not cast any material doubt on either the defendant’s confession or the child victim’s forensic interview, and therefore, the defendant was not prejudiced.” We conclude that the trial court properly exercised its discretion in excluding the evidence.

Borges also contends that his trial counsel was ineffective for failing to investigate the recantation letter, failing to review discovery, and failing to call an expert witness to analyze J.C.’s forensic interview. To prevail on an ineffective assistance of counsel claim, a defendant must show *both* deficient performance, and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court does not need to address both aspects of the *Strickland* test if the defendant does not make a sufficient showing on one of them. *Id.* at 697.

Borges’s contention that trial counsel’s errors led to his conviction is conclusory, as his postconviction motion failed to demonstrate that he was prejudiced by any of counsel’s alleged deficiencies. None of Borges’s arguments accounted for the fact that Borges admitted to assaulting J.C. By failing to acknowledge his confession, Borges also failed to demonstrate how any of trial counsel’s alleged deficiencies could have possibly overcome the totality of the

evidence presented to the jury. *Id.* The totality of the evidence also included J.C.’s forensic interview, in which she described the assault, and evidence of Borges’s recorded jail calls, in which he admitted to showering with J.C. The record overwhelmingly supports the jury’s verdict. Accordingly, the postconviction court did not err in denying Borges’s postconviction motion without a hearing. *Allen*, 274 Wis. 2d 568, ¶30.

For the foregoing reasons, the judgment of conviction and order denying Borges’s postconviction motion are affirmed.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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