

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0890-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GORDON DAIN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Snyder, P.J., Anderson and Ziegler,¹ JJ.

PER CURIAM. Gordon Dain appeals pro se from judgments² convicting him of false imprisonment while possessing a dangerous weapon and

¹ Circuit Judge Annette K. Ziegler is sitting by special assignment pursuant to the Judicial Exchange Program.

first-degree sexual assault and from an order denying his pro se postconviction motion for a new trial due to ineffective assistance of trial counsel. We affirm.

Dain was convicted in the 1994 sexual assault and false imprisonment of his estranged wife. Dain did not deny that sexual intercourse took place when and where the victim alleged. However, he contended that the activity was consensual and was not accompanied by false imprisonment. The jury rejected Dain's theory of defense. In a postconviction motion, Dain argued that his trial counsel was ineffective. The trial court denied the motion without a hearing because its allegations were "merely conclusory in nature and fail[ed] to set forth evidentiary facts which, if proven, would support defendant's claim." On appeal, Dain challenges the denial of his motion and the admission of evidence at trial.

We consider whether the trial court erroneously exercised its discretion in denying Dain an evidentiary hearing on his ineffective assistance of counsel motion. See *State v. Bentley*, 201 Wis.2d 303, 310-11, 548 N.W.2d 50, 53-54 (1996). We are guided by the following test in assessing the trial court's denial of Dain's motion without an evidentiary hearing.

If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. *Nelson*, 54 Wis.2d at 497. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo. See *Nottelson v. DILHR*, 94 Wis.2d 106, 116, 287 N.W.2d 763 (1980) (whether facts fulfill a particular legal standard is a question of law).

However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction

² Although Dain's notice of appeal specifies that the appeal is from the postconviction order, we construe the notice of appeal as encompassing the judgments of conviction.

motion without a hearing based on any one of the three factors enumerated in *Nelson*. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard. *Brookfield v. Milwaukee Metropolitan Sewerage Dist.*, 171 Wis.2d 400, 423, 491 N.W.2d 484 (1992).

Id.

A claim of ineffective assistance of counsel arises from deficient performance by counsel which prejudiced the defendant. *See State v. Sanchez*, 201 Wis.2d 219, 232-36, 548 N.W.2d 69, 74-76 (1996). To show prejudice, the defendant must demonstrate "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." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

In his postconviction motion, Dain alleged that trial counsel failed to investigate and prepare for trial, and that had counsel done so it was reasonably probable that the outcome at trial would have been different. Dain identified several witnesses who would have had information relating to Dain's "activities, time accountability and purpose for being in" the victim's community on the evening of the assault. Dain contended that these witnesses would have "undermine[d] the State's circumstantial evidence of planned intent to support victim's account of the events."

We reject this ineffective assistance claim. Dain's theory of defense was that the intercourse was consensual. Because Dain admitted having intercourse with the victim at the time that she claims nonconsensual intercourse occurred, discrepancies regarding time, place and Dain's reasons for being in the victim's community were not relevant. Therefore, Dain was not prejudiced by trial counsel's failure to present irrelevant evidence. *See State v. Moats*, 156

Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990) (we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice).

Dain also faulted trial counsel for not investigating and presenting at trial his stepdaughter's testimony that Dain had a good relationship with her and other children in the family. We fail to see the relevance of this testimony to the charges in this case or how this evidence would have altered the outcome of the trial. Dain also fails to indicate what additional investigation would have revealed and how it would have changed the outcome of the trial. *See State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). This claim did not warrant an evidentiary hearing.

Dain complained that trial counsel did not present the testimony of Paul and Lynn Armstrong that Dain and the victim had been "seeing each other and having sexual relations" prior to the assault. The trial court correctly ruled that this issue did not warrant an evidentiary hearing because Dain did not offer any information as to how the Armstrongs came to know that he and the victim were having a sexual relationship prior to the assault. The victim testified that she had not had sexual relations with Dain since March 1994, which was prior to their separation. In the absence of an assertion indicating that the Armstrongs' knowledge was other than hearsay based, the court did not err in rejecting Dain's claim that had counsel interviewed the Armstrongs, counsel would have discovered admissible evidence for the defense.

Dain also contended in his postconviction motion that trial counsel should have investigated and presented the testimony of Dain's son, Brad, relating to the execution of a search warrant. According to Dain's motion, Brad would

have testified that the police found a knife after going through unpacked boxes. Dain contends that this would have contradicted and discredited testimony that the knife was found lying about his house.

Two knives were found by the police in Dain's home and vehicle and were admitted as exhibits at trial. The victim testified that Dain brandished a knife when he assaulted her and that Exhibit 15 "looks like the knife" and was substantially the same as the knife Dain used during the assault. Exhibit 15 was found in Dain's home. The son would have testified that the knife admitted at trial was found in a closed packing box and therefore it could not have been the knife that Dain brandished during the assault two days before.

It is not reasonably probable that this testimony would have changed the outcome of the trial. The knife's presence in a sealed packing box two days after the assault did not preclude its use in the assault. There is no question that the knife was found in Dain's home and was identified by the victim as being substantially similar to the knife Dain brandished during the assault.

Dain argues that trial counsel should have presented the testimony of Dain's daughter that she overheard a telephone conversation Dain had with Howie Manos in which Dain never said the victim's name or made any references to her. This allegation is conclusory; it is impossible to assess the relevancy of this proposed testimony. As the State points out, Dain's motion did not allege that this was the same telephone conversation about which Manos testified at trial. In that conversation, Dain threatened to have the victim taken care of if he was convicted of the assault. A court may deem unworthy of a hearing allegations in a postconviction motion that are unsupported by sufficient factual assertions. *See State v. Washington*, 176 Wis.2d 205, 216, 500 N.W.2d 331, 336 (Ct. App. 1993).

A defendant must allege specific facts as to both the performance and prejudice prongs required to sustain an allegation of ineffective assistance of counsel. *See State v. Saunders*, 196 Wis.2d 45, 51, 538 N.W.2d 546, 549 (Ct. App. 1995).

In his appellant's brief, Dain contends that the case against him was a circumstantial evidence case. He is incorrect. The victim testified that Dain sexually assaulted and falsely imprisoned her while armed. This is direct evidence of Dain's guilt. Circumstantial evidence is the proof of certain facts from which a jury may logically infer the existence of other facts according to the knowledge or common experience of mankind. *See WIS J I—CRIMINAL 170*. The victim's testimony did not require an inference.

Our de novo review of Dain's postconviction motion confirms that he did not allege sufficient facts to warrant an evidentiary hearing. Therefore, the trial court properly exercised its discretion in denying the motion without a hearing. *See Bentley*, 201 Wis.2d at 310-11, 548 N.W.2d at 53-54.

On appeal, Dain also argues that the trial court erroneously admitted evidence of threats he made and his attempts to recruit third persons to harass the victim into recanting her allegations. Prior to trial, the State moved the court to admit the following evidence of Dain's postcrime threats against the victim: (1) Dain's statements to Manos, his former business partner and whose wife was a good friend of the victim, that if Dain went to jail "he was prepared to have [the victim] taken care of" and had "prepaid" to do so; and (2) Dain's daughter's testimony about overhearing Dain's portion of a telephone conversation in which Dain talked about "his case" with a male caller and stated that steps should be taken to get the victim to drop her allegations against Dain.

The trial court granted the State's motion because the proffered testimony was relevant evidence of Dain's consciousness of guilt. The court found that if Dain intended the statements to be communicated to the victim, they were intended to obstruct justice. The court found that the threats would have the effect of dissuading a potential witness from pursuing her allegations. The court then concluded that the probative value of the evidence outweighed its prejudicial effect.

At trial, Dain's daughter testified that she overheard Dain's end of a telephone conversation four months after the assault. Dain stated to the caller that they should see if they could talk the victim out of pursuing the case against him. Dain's daughter affirmed that at an earlier hearing she had testified that Dain used the word "harass" to refer to the steps he wanted taken to get the victim to drop the charges. Dain asked the caller to harass the victim. Dain also stated that if he was convicted, he would have the victim harassed and stalked even if he went to prison. Dain told the caller that he could find the victim at her place of employment.

Manos testified that his wife was a very good friend of the victim's. In telephone conversations approximately four months after the assault, Dain told Manos that if he went to jail he was prepared to have the victim "taken care of." Manos inferred that Dain was talking about having the victim harmed. Manos stated that Dain told him that "he had prepaid to have this done."

After the evidence was presented to the jury, the court noted that the threats, whether communicated to the victim or not, indicated consciousness of guilt. The court permitted the prosecutor to argue the inference that Dain intended his threats to be communicated to the victim via Manos and his wife. However,

the court noted that Dain could argue that he wanted the victim to drop the charges because he was innocent.

Dain testified at trial that he did not recall the telephone conversation overheard by his daughter and did not recall discussing the pending charges with Manos. The jury was instructed that Dain's statements, as reported by his daughter and Manos, were received into evidence to demonstrate Dain's "state of mind evincing a consciousness of guilt or an intent to obstruct justice." The jury was advised that the evidence was restricted to that purpose. In his closing argument, the prosecutor argued that the threats evidenced Dain's consciousness of guilt. Dain argued that he was merely blowing off steam as a result of being wrongly accused.

On appeal, Dain argues that the consciousness of guilt evidence was actually impermissible other acts evidence under § 904.04, STATS., i.e., evidence offered "to prove the character of a person in order to show that he acted in conformity therewith." See *State v. Shillcutt*, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). We agree with the trial court that evidence of Dain's threats was evidence of consciousness of guilt, not other acts evidence under § 904.04.

The admission or exclusion of evidence is within the discretion of the trial court and its ruling will not be overturned on appeal absent a misuse of that discretion. See *State v. Lindh*, 161 Wis.2d 324, 348-49, 468 N.W.2d 168, 176 (1991). "The term discretion contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards." *Christensen v. Economy Fire & Cas. Co.*, 77 Wis.2d 50, 55-56, 252 N.W.2d 81, 84

(1977). The court properly exercised its discretion in admitting the challenged evidence.

“It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge.” *State v. Neuser*, 191 Wis.2d 131, 144, 528 N.W.2d 49, 54 (Ct. App. 1995) (quoted source omitted). Dain’s threats to the victim were evidence of the underlying criminal act and highly probative of Dain’s consciousness of guilt. The evidence was admissible even though it was substantially prejudicial to Dain. Finally, we note that potential prejudice is presumptively erased when admonitory instructions are given. *See Sommers v. Friedman*, 172 Wis.2d 459, 467, 493 N.W.2d 393, 396 (Ct. App. 1992).

Dain contends that there was no evidence that the threats were communicated to the victim or that she was ever actually harassed. This objection does not undermine the admissibility of the evidence. Consciousness of guilt evidence relates to the defendant’s state of mind. Dain made threats to the victim that his daughter overheard and to his former business partner, whose wife was a very good friend of the victim. The manner and nature of these threats permit a reasonable inference that Dain intended these threats to make their way to the victim, even if they never actually did.

By the Court.—Judgments and order affirmed.

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

