COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2267 **Cir. Ct. No. 2008CF5374**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK DANIEL CABAGUA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS J. MCADAMS, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Mark Daniel Cabagua, *pro se*, appeals the circuit court order denying his WIS. STAT. § 974.06 (2015-16) motion to withdraw his ***Alford*** pleas to repeated sexual assault of a child, first-degree sexual assault of a child, and second-degree sexual assault of a child.[1] We conclude: (A) Cabagua was properly informed of the elements of the crimes to which he entered pleas; (B) exculpatory evidence was not withheld; (C) the documents Cabagua relies on are not newly discovered evidence; (D) neither Cabagua's trial counsel nor his postconviction counsel were ineffective; and (E) Cabagua is not entitled to a new trial in the interest of justice. Therefore, we affirm.

I. BACKGROUND

¶2 In 2008, Cabagua was charged with three counts of first-degree sexual assault of a child, one count of repeated sexual assault of a child, one count of second-degree sexual assault of a child, and one count of attempted second-degree sexual assault of a child. The victim was Cabagua's daughter and the charges were based on crimes alleged to have occurred when she was between the ages of eight and thirteen. On the date the jury trial was to begin, Cabagua entered ***Alford*** pleas to one count of repeated sexual assault of a child, one count of first-degree sexual assault of a child, and one count of second-degree sexual assault of a child. The remaining counts were dismissed and read in for purposes of sentencing. The circuit court imposed sentences totaling fifty years of

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

imprisonment bifurcated as twenty-five years of initial confinement and twenty-five years of extended supervision.

¶3 Postconviction counsel filed a motion seeking resentencing based on ineffective assistance of trial counsel. The circuit court denied the motion.

¶4 Five years later, Cabagua, *pro se*, filed a WIS. STAT. § 974.06 motion seeking to withdraw his ***Alford*** pleas. The postconviction court denied the motion, and Cabagua filed this appeal. While this matter was pending, we granted a motion filed by Cabagua. We concluded that it was in the interests of judicial efficiency to remand so that a determination could be made as to whether information submitted by Cabagua, which he indicated had not been presented to the circuit court, affected its decision to deny his § 974.06 motion. *See* WIS. STAT. § 808.075(5).

¶5 On remand, in his supplemental motion for postconviction relief, Cabagua asserted that after filing his original WIS. STAT. § 974.06 motion, he obtained new evidence in the form of a medical report, a DNA report, and a police report. According to Cabagua, this new evidence would have impacted the postconviction court's decision on the motion as originally filed. The postconviction court denied the supplemental motion based on its "find[ing] that the three reports would not have had any effect whatsoever on [the] prior analysis and decision[.]"[2]

¶6 Additional facts are presented as relevant below.

[2] The Honorable Thomas J. McAdams issued the decision and order denying Cabagua's original motion for postconviction relief. The Honorable Mark A. Sanders issued the decision and order denying Cabagua's supplemental motion for postconviction relief.

II. DISCUSSION

¶7 We analyze the sufficiency of a postconviction motion under WIS. STAT. § 974.06 using a familiar standard. The movant is entitled to an evidentiary hearing only if he or she alleges facts that, if true, would entitle the movant to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. This is a question of law for our independent review. *See* ***id.*** "However, if the motion does not raise such facts, 'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,' the grant or denial of the motion is a matter of discretion entrusted to the circuit court." ***Id.*** (citation omitted). Moreover, the supreme court has made clear that "'an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that [the] defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts.'" ***Id.***, ¶50 (citation omitted).

(A) *Cabagua was properly informed of the elements of the crimes to which he entered pleas.*

¶8 Referencing ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), Cabagua first argues that his pleas are infirm because he was not aware of the essential elements of the crimes and, therefore, did not understand the nature of the charges. Specifically, he contends that he was not aware of the elements of sexual contact and that the circuit court "ignored that sexual gratification is an element to the crimes."

¶9 A claim for plea withdrawal pursuant to ***Bangert*** cannot be maintained in the context of a postconviction motion filed under WIS. STAT. § 974.06. *See* ***State v. Carter***, 131 Wis. 2d 69, 81-82, 389 N.W.2d 1 (1986). Motions filed under § 974.06 are limited to issues of constitutional or

jurisdictional dimension. ***Balliette***, 336 Wis. 2d 358, ¶34 n.4. An allegation that the circuit court failed to follow the procedures of WIS. STAT. § 971.08 or other court-mandated duties is not an allegation of a constitutional violation. *See* ***Carter***, 131 Wis. 2d at 82-83. Therefore, Cabagua cannot maintain a ***Bangert*** claim for plea withdrawal in this proceeding.

¶10 Cabagua, however, suggests that he lacked necessary information at the time of the plea hearing. "The constitution requires that a plea be voluntarily, knowingly and intelligently entered and a manifest injustice occurs when it is not." ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). A plea may be challenged as constitutionally defective under WIS. STAT. § 974.06. *See* ***Carter***, 131 Wis. 2d at 82-83. Accordingly, we consider Cabagua's constitutional challenge.

¶11 Cabagua was initially charged with six counts of sexually assaulting a child. The victim was the same in all of the charges. Count one of the complaint alleged that Cabagua had sexual contact with the victim; counts two through six alleged that he had sexual intercourse with her.

¶12 Prior to the plea hearing, Cabagua signed a plea questionnaire indicating that he would be pleading to counts two, three, and five. During the plea hearing, the State informed the court that in exchange for Cabagua's plea to those charges, it would move to dismiss and read-in all of the remaining counts in the case. Cabagua confirmed that he understood the negotiations.

¶13 Cabagua indicated in the addendum to the plea questionnaire and during the plea hearing that he had reviewed the complaint, which provided that the three counts to which he was pleading involved allegations of sexual intercourse. The applicable jury instructions were attached to the plea

questionnaire with the words "sexual contact" crossed out and the word "intercourse" written in or circled. The circuit court reviewed the elements of the offenses with Cabagua making clear that each charge allegedly involved sexual intercourse, and Cabagua confirmed that he understood.

¶14 Sexual contact was irrelevant—the charges centered on sexual intercourse. While sexual contact requires proof that the act was done for the purpose of sexual degrading or humiliating the complainant or sexually arousing or gratifying the defendant, *see* WIS. STAT. § 948.01(5), it was unnecessary to explain sexual gratification because sexual contact was not charged.

¶15 To the extent that Cabagua generally asserts he was not informed of the elements of WIS. STAT. § 948.01(6), defining sexual intercourse, this argument is undeveloped.[3] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to consider undeveloped legal arguments). He does not cite to authority requiring the circuit court to provide the statutory definition of sexual intercourse and he does not assert that he did not understand the meaning of intercourse under the facts of this case.[4]

[3] WISCONSIN STAT. § 948.01(6) provides:

> "Sexual intercourse" means vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

[4] The complaint specified: as to count two, Cabagua had "sexual intercourse (penis-to-mouth) on three or more occasions with [the victim]"; as to count three, Cabagua had "sexual intercourse (penis-to-vagina) with [the victim]"; and, as to count five, he had "sexual intercourse (penis-to-vagina) with [the victim]." Again, during the plea colloquy, the circuit court confirmed that Cabagua had reviewed the complaint and Cabagua agreed that it could be used as a factual basis for his pleas.

¶16 Cabagua was informed of all the essential elements of the crimes to which he entered his pleas, none of which charged him with having sexual contact. The record demonstrates that Cabagua understood the nature of the charges.[5]

(B) *Exculpatory evidence was not withheld.*

¶17 Cabagua also argues that the State failed to disclose exculpatory evidence. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). He claims that the State failed to provide him with several documents prior to the plea hearing and that had he been aware of these documents, he would not have entered his pleas. The documents consist of the following: (1) a DNA report that says there was no semen on a black bed sheet; (2) a medical report that says the victim's hymen was intact; and (3) a police report with witness information.

[5] In a footnote in his reply brief, Cabagua argues that the plea colloquy does not indicate that he knew the State had to prove beyond a reasonable doubt the purpose of the alleged conduct. It appears Cabagua is making this argument for the first time in his reply brief, which is improper. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (explaining that appellate courts do not address issues raised for the first time in an appellant's reply brief). In any event, it is belied by the record. The transcript of the plea colloquy reveals that the circuit court specifically told Cabagua that the State "has the responsibility of proving each and every element of these offenses beyond a reasonable doubt. By you entering ***Alford*** pleas today, you are giving up that and the other rights we just discussed. Do you understand that, sir?" Cabagua answered affirmatively. Additionally, on the plea questionnaire form, the box is checked next to "I give up my right to make the State prove me guilty beyond a reasonable doubt." Cabagua told the circuit court that his trial counsel read all of the information on the forms to him and stated that he did not have any additional questions about the forms.

¶18 The burden to show a ***Brady*** violation rests with the defendant. *See* ***State v. Harris***, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. Pursuant to ***Brady***:

> "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." As such, to establish a ***Brady*** violation, a defendant must show that the State suppressed evidence favorable to the defendant and material to the determination of guilt.

State v. Lock, 2012 WI App 99, ¶93, 344 Wis. 2d 166, 823 N.W.2d 378 (citations omitted). When addressing an alleged ***Brady*** violation, we independently review whether a due process violation has occurred, but we accept the circuit court's factual findings unless they are clearly erroneous. ***Lock***, 344 Wis. 2d 166, ¶94.

¶19 First, Cabagua has not established that the State suppressed the evidence. The record shows that trial counsel made a demand for discovery that included a request for laboratory reports, hospital reports, and police reports. Additionally, the record indicates that the State's Notice of Expert Witness stated that the medical report and the DNA report were given to the defense. The prosecutor was able to locate the police report in the State's file and provided copies to Cabagua pursuant to his postconviction request. The State submits that if the prosecutor was willing to provide the reports pursuant to Cabagua's informal request, there is no reason to believe that he did not provide these reports pursuant to the formal request of Cabagua's trial counsel.

¶20 Cabagua falls short of showing a ***Brady*** violation. All he has shown is that his trial counsel and the State Public Defender's office were unable to

locate the documents several years after they closed their files. Neither said that they never had copies of the documents.

¶21 Second, even if we assume suppression occurred here, Cabagua's claim fails because he has not shown that any of the documents were "'material.'" *See* ***Harris***, 272 Wis. 2d 80, ¶13 ("In order to establish a ***Brady*** violation, the defendant must, in addition to demonstrating that the withheld evidence is favorable to him, prove that the withheld evidence is 'material.'") (citation omitted); *see also* ***Harris***, 272 Wis. 2d 80, ¶16 (explaining that "'[t]he mere possibility that an item of undisclosed information might have helped the defense ... does not establish materiality in the constitutional sense'") (brackets and ellipses in ***Harris***; citation and one set of quotation marks omitted). "'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶14 (citation and one set of quotation marks omitted).

1. The DNA Report

¶22 The DNA report indicating that no semen was found on a black fitted sheet is not material exculpatory evidence. The victim told police there might be semen on the sheet from Cabagua's bed because that is where he repeatedly had sexual intercourse with her. The victim also said that Cabagua used a condom half of the times he had intercourse with her, always wiped himself off with a towel or shirt, and washed those items right away. She further reported that the last assault took place more than a week before the sheet was seized. Consequently, a report indicating the absence of semen on a sheet that

was tested long after the acts, and in light of the other circumstances, does not create a reasonable probability that the result of the proceeding would have been different.

2. The Medical Report

¶23 Contrary to Cabagua's assertions, the medical report does not prove that he never engaged in sexual intercourse with the victim. The medical report provides that the victim had a normal genital exam. The report specifically showed that the victim's hymen was intact; however, there was a written notation that most children who are victims of sexual abuse have normal medical exams. The nurse practitioner who conducted the examination made it a point to tell the police that the fact that a young girl's hymen is still intact does not mean she did not experience sexual activity. The medical report does not rule out the possibility that the victim had sexual intercourse, and, therefore, does not create a reasonable probability that the result of the proceeding would have been different.

3. The Police Report

¶24 The police report reflects a series of interviews where the victim consistently stated that Cabagua repeatedly sexually assaulted her. Other witnesses who were interviewed substantiated details provided by the victim and offered information about prior instances of concerning behavior involving Cabagua. Any minor discrepancies, to the extent they qualify as such, contained within the lengthy report of interviews do not amount to material exculpatory evidence. Insofar as Cabagua contends on appeal that the police report identified "exculpatory witnesses [who] would have all come forward with exculpatory

information," his argument is undeveloped, and we will not address it further.[6] *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶25 Because the DNA report, the medical report, and the police report were not "material" exculpatory evidence, a ***Brady*** violation did not occur. *See* ***Harris***, 272 Wis. 2d 80, ¶14.

(C) *The documents Cabagua relies on are not newly discovered evidence.*

¶26 Cabagua intertwines a claim of newly discovered evidence based on the same documents he relies on to argue a ***Brady*** violation. For a defendant to obtain plea withdrawal based on newly discovered evidence, he or she "must establish by clear and convincing evidence that '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). After a defendant proves these four criteria, in reviewing the newly discovered evidence, we "should consider whether a jury would find that the newly[ ]discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt. This latter determination is a question of law." *See* ***State v. Plude***, 2008 WI 58, ¶¶32-33, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted).

[6] Cabagua also contends, without citation to the record, that the victim recanted her allegations. As the State points out, the record reflects that the victim refused to recant her accusations despite Cabagua's efforts to pressure her to do so. Cabagua was charged with eight counts of intimidation of a witness, all of which were eventually dismissed as part of the plea agreement.

¶27 Even if we concluded that Cabagua proved the four initial criteria, his newly discovered evidence claim necessarily fails. As previously determined, the documents did not contain material exculpatory evidence. Consequently, they would not have created a reasonable doubt as to Cabagua's guilt. *See* ***id.***, ¶33.

(D) *Neither Cabagua's trial counsel nor his postconviction counsel were ineffective.*

¶28 We now turn to Cabagua's claims that his postconviction counsel ineffectively failed to challenge his trial counsel's assistance. We assess claims of trial counsel's alleged ineffectiveness by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A convicted defendant must thus establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. If a defendant fails to establish one prong of the ***Strickland*** test, we need not discuss the other prong. *See* ***id.***, 466 U.S. at 697.

¶29 To demonstrate deficiency, a defendant must show that trial "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. To demonstrate prejudice in a case resolved with a plea, the defendant must allege facts sufficient "to show 'that there is a reasonable probability that, but for the counsel's errors, [the defendant] would not have pleaded … and would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted). "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).

¶30 Cabagua begins by asserting that his trial counsel was ineffective for not presenting a defense based on the following arguments: the victim had a motive to accuse him of repeatedly sexually assaulting her because he did not let her get her way, made her work around the house, and forced her to leave a party early; the victim simply dreamed that Cabagua sexually assaulted her because Cabagua himself had bad dreams as a child; the victim delayed reporting of the sexual assaults and was unable to remember specific dates on which the sexual assaults occurred; and no one else who was present in the home when the sexual assaults occurred saw or heard anything.

¶31 Cabagua's claims fail because he has not overcome the presumption that his trial counsel could have reasonably concluded that these were not viable defenses. *See* ***Johnson***, 153 Wis. 2d at 127 (explaining that to prove deficient performance, "the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted *reasonably* within professional norms") (emphasis added). First, it was unlikely the jury would be persuaded by Cabagua's "dream theory" or would believe that the victim would lodge such serious accusations against her own father for such petty reasons. Second, it is common for children to delay reporting sexual assaults due to fear, embarrassment, or guilt and to be confused about the time frame of assaults, particularly in a situation such as this, where the assaults were alleged to have occurred over a period of several years. *See, e.g.*, ***State v. Dunlap***, 2002 WI 19, ¶¶6, 39, 250 Wis. 2d 466, 640 N.W.2d 112 (detailing expert testimony to this effect).

¶32 Regarding Cabagua's contention that no one else who was present in the home saw or heard anything, the victim told police that the assaults always happened while her mother was at work and that they usually happened in

Cabagua's bedroom behind locked doors. When anyone knocked on the door and asked where the victim was, Cabagua would say he did not know. As to assaults alleged to have occurred outside the bedroom, Cabagua's trial counsel could have reasonably concluded that the lack of eyewitnesses would not have been a defense worth pursuing because it was unlikely Cabagua would have sexually assaulted the victim when other people were around to see what he was doing.

¶33 Cabagua then seems to argue that his trial counsel was ineffective for not presenting a defense based on the medical report showing that the victim had a normal genital exam. Cabagua believes the exam "produced no evidence that [the victim] did engage in any form of sexual intercourse as alleged[.]" However, as previously detailed, this is not what the medical report revealed; consequently, Cabagua's trial counsel could have reasonably concluded that a defense based on the medical report was not worth pursuing. In a related argument, Cabagua faults trial counsel for not finding or telling him about the medical report, the DNA report, and the police report. Again, the record suggests that trial counsel had these documents prior to Cabagua's plea hearing. Even if trial counsel did not share them with Cabagua, he has not properly alleged prejudice given that nothing in the documents could have made Cabagua think he had a reasonable chance of prevailing at a trial on the numerous crimes with which he was charged. *See* ***Bentley***, 201 Wis. 2d at 313 (explaining that to establish prejudice in this context, "[a] defendant must do more than merely allege that he would have plead differently; such an allegation must be supported by objective factual assertions").

¶34 Next, Cabagua claims his trial counsel was ineffective for failing to seek out information that someone else committed the crimes. He does not

explain who else might have been responsible. This conclusory and undeveloped assertion does not warrant discussion. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶35 In addition, Cabagua argues he "felt that he had no choice [but] to enter his pleas in light of counsel's lack of initiative to develop a defense, and his failure to undertake any investigation into the case." He claims he had less than thirty minutes to make a decision as to whether to enter pleas. The record shows that he was considering a plea deal for more than a month prior to the plea hearing. And, while Cabagua's trial counsel wanted him to make a decision regarding the plea deal, there is no indication in the record that counsel somehow forced him to accept it.

¶36 Cabagua also takes issue with the circuit court's decision to allow his mother into the courtroom, but he does not connect this to a claim of ineffective assistance of trial counsel. If he is claiming that his attorney was ineffective for not objecting to his mother's presence in the courtroom, he does not explain why trial counsel would have had legal grounds to object. Moreover, the record reveals that Cabagua expressly asked to be allowed to talk to his mother, who traveled from New Mexico to attend the proceedings. While noting that it was an unusual request, the circuit court allowed it based on the circumstances. Cabagua cannot now argue that by accommodating his request, the circuit court erred. *See* ***Nickel v. United States***, 2012 WI 22, ¶23, 339 Wis. 2d 48, 810 N.W.2d 450 (explaining that a defendant cannot affirmatively contribute to what he now claims was circuit court error).

¶37 Cabagua goes on to assert that trial counsel misled him by "stating the plea was for five years." However, what counsel said during the sentencing phase of the hearing was that "[o]ur recommendation is 5 years initial

confinement, plus 5 years extended supervision on each count, concurrent."[7] Cabagua knew that the court was not bound by the plea negotiations or any sentence recommendations and could sentence him to the maximum on each count. When asked by the circuit court whether he was entering his pleas of his own free will, Cabagua confirmed that he was.

¶38 In another contention that is not supported by the record, Cabagua claims the sentencing transcript shows that he was on a heavy amount of a prescription medication. It does not. During the plea proceedings, which took place immediately prior to sentencing, Cabagua told the circuit court that he was not on any medication.

¶39 Insofar as Cabagua makes a passing reference to trial counsel not informing him of the elements of the crimes, as previously discussed, both Cabagua's trial counsel and the circuit court properly advised Cabagua that the charges involved sexual intercourse. There was no reason to advise Cabagua about the purpose element of sexual contact because he did not enter pleas to any offenses charging him with having sexual contact.

¶40 Lastly, Cabagua submits that his trial counsel was ineffective for not interviewing his wife regarding where the family lived in 2002, what shift he worked from 1999 to 2004, and the period of time when he was in jail on separate charges. But Cabagua does not sufficiently explain why he could not have relayed this information himself or why it mattered in light of the time frames set forth in the complaint. Regarding Cabagua's claim that his wife would have proven that

[7] The plea and sentencing hearings were combined.

he could not perform any sexual activity while they lived at one of the addresses where the assaults occurred, the record refutes this. The police report reveals that Cabagua's wife told police she and Cabagua had intercourse in June of 2008, during the period of time when the family lived at the address in question.

¶41 Cabagua's numerous claims of ineffective assistance of trial counsel fail for various reasons. Either he did not overcome the strong presumption that counsel acted reasonably within professional norms, he did not demonstrate prejudice, or the claims amount to conclusory allegations that are belied by the record. *See* ***Balliette***, 336 Wis. 2d 358, ¶18; *see also* ***Allen***, 274 Wis. 2d 568, ¶15 (noting that "[i]t has been said repeatedly that a postconviction motion for relief requires more than conclusory allegations"). Because Cabagua failed to prove that his trial counsel was ineffective, his claim that postconviction counsel was ineffective for not pursuing trial counsel's ineffectiveness likewise fails.[8] *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (explaining that where a defendant claims ineffective assistance of postconviction counsel for not challenging trial counsel's effectiveness, a defendant must establish that trial counsel was actually ineffective).

[8] Cabagua also appears to argue for the first time in his reply brief on appeal that his trial counsel did not advise him of the effects that read-in charges would have. *See* ***A.O. Smith Corp.***, 222 Wis. 2d at 492 (explaining that appellate courts do not address issues raised for the first time in an appellant's reply brief). In any event, the record refutes this insofar as the plea questionnaire, which Cabagua signed, explained the effects of the read-in charges. During the plea hearing, Cabagua confirmed for the circuit court that his trial counsel had reviewed the plea questionnaire with him.

(E) *Cabagua is not entitled to a new trial in the interest of justice.*

¶42 Cabagua requests a new trial in the interest of justice. His request hinges on his belief that the State withheld favorable evidence. As detailed above, this court is not convinced that any such withholding occurred. Beyond this, Cabagua's argument is undeveloped. *See* ***Pettit***, 171 Wis. 2d at 646-47. "Our discretionary reversal power is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. This case does not warrant the exercise of that power.

By the Court.—Order affirmed.

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