COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1331-CR **Cir. Ct. No. 2003CF35**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. HIPLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Joseph P. Hipler appeals a judgment of conviction entered on a jury verdict for one count of first-degree sexual assault and one count of false imprisonment, as well as orders denying his motion for postconviction relief. In support of his appeal, Hipler argues that the trial court

erred in the following respects: (1) by allowing the introduction of inadmissible "other acts" evidence at trial; (2) by allowing lay testimony of a State witness despite the State's lack of timely notice of the witness; (3) by allowing irrelevant testimony of the State's expert witness without providing a curative instruction or allowing rebuttal expert testimony from a defense witness; (4) by erroneously exercising its sentencing discretion in not imposing a probationary sentence; and (5) by rejecting his motion for postconviction relief without an evidentiary hearing. Hipler further asserts that he received ineffective assistance of counsel both prior to and during trial. We disagree with all of these arguments and affirm the judgment of conviction and the orders denying postconviction relief.

BACKGROUND

¶2 Hipler was charged with one count of first-degree sexual assault and one count of false imprisonment for events that occurred on March 29, 2003. The relevant undisputed facts are as follows. On March 29, 2003, K.N., who was a neighbor of Hipler's, came to his apartment to help clean up after socializing at the apartment the previous night. Hipler's friend Clinton Cowles was also at the apartment visiting, and the three of them had some drinks and discussed going to a party that evening hosted by a friend of Cowles. The rest of the day's events are in dispute.

¶3 K.N. testified to the following facts. After a couple of hours at Hipler's apartment, other unknown individuals began stopping by the apartment, going into Hipler's bedroom, and staying in the bedroom for a few minutes before leaving the apartment again. At one point, K.N. witnessed Hipler, Cowles, and two other individuals in the bedroom with a "gallon size bag" of white powder that K.N. "assumed at the time to be cocaine." When Hipler saw K.N. in the bedroom

doorway observing him and the others with the bag of white powder, he at first appeared surprised, then angry. When Hipler asked K.N. what she was doing, K.N. said she was leaving, but Hipler demanded she stay in the apartment and physically prevented her from leaving by grabbing her arm and forcibly escorting her to the living room.

¶4 Over the course of that night, Hipler then forced K.N. to accompany him to Cowles' apartment, a bar, and a party, keeping her close to him, keeping her purse and cell phone when she went to the restroom, and at times continuing to restrain her by force. K.N. observed a razor blade and white powder at Cowles' apartment, after which the following conversation transpired:

> I think it was at that point that he said to me, you didn't see anything tonight. And I said to him, I don't know what you are talking about. He said, okay, well good, you didn't see anything tonight, if you make problems for me I will make problems for you, your friends and your family.

¶5 When they returned to the apartment building they both lived in, K.N. tried to go into her apartment but Hipler stopped her, demanding, "What are you doing?" and grabbed her by the hair, pulling her back. K.N.'s keys went flying, hitting Hipler in the face and angering him. Hipler then pushed K.N. up against the wall, with his forearm against her chest, all the while swearing at her. Hipler then grabbed K.N. by the arm and directed her to his apartment.

¶6 The next thing K.N. remembered was that she and Hipler were sitting on his couch and then were suddenly in Hipler's bedroom on the bed, with Hipler holding a gun to her head. K.N. was fighting against Hipler and he could not control her, so he "put the gun down and then pinned my arms above my head, and then he was having sex with me." K.N. continued fighting him and telling him no. At one point K.N. brought her arm up and hit Hipler on the side of his

face and he then backed off, seemingly shocked. K.N. then grabbed his genitals and pulled as hard as she could. Hipler rolled off the bed and fell onto the ground; K.N. then got up and returned to her apartment.

¶7 On April 7, K.N. went home to her father's house, and was visibly upset and worried when she arrived, according to her father's testimony. After questioning, K.N. informed her father she had been raped. K.N.'s father called the River Falls Police Department and reported the sexual assault. The next day, K.N. gave a statement in person to River Falls police officer Bruce Whitaker about the sexual assault. The same day, K.N.'s father took her to a clinic where she was examined by nurse Linda Friede.

¶8 Hipler's version of the events of March 29, 2003, varied in the following pertinent respects. Hipler denied that anyone who stopped by his apartment that day ever went into his bedroom. He testified that he never forced K.N. to stay in his apartment or to accompany him when he left and that he never physically restrained her or told her she could not leave. Rather, Hipler testified, K.N. had asked to come along to Cowles' party, where Hipler left K.N. alone on several occasions. Hipler also testified that K.N. took her purse and cell phone with her when she went to the bathroom, and that he never did anything to prevent her from using her phone. Hipler testified that when K.N. said she wanted to go home, he gave her a ride home. Once they arrived at their apartment building, Hipler testified, they went their separate ways, each going home to their respective apartments. However, Hipler testified, K.N. returned to his apartment, saying she had left her beer in his apartment earlier and had come over to retrieve it. Hipler testified that after K.N. returned, she got a "little flirty" with him and they exchanged a brief kiss, but after K.N. asked him about the girl he was seeing, he stopped any further physical contact. Hipler testified that he never prevented K.N.

from going to her apartment or falsely imprisoned her, never pulled her hair or threw her up against a wall, and never sexually assaulted her. Hipler also denied ever owning a handgun.

¶9 Hipler was convicted of first-degree sexual assault and false imprisonment after a two-day jury trial. After the trial, Hipler submitted to a polygraph test administered by a licensed psychologist. During this test, Hipler's story changed; he admitted that after returning to his apartment from the party, he and K.N. began to have consensual sex, wherein he placed his penis into her vagina, but just after penetration, he stopped and ended the sexual activity. The results of the polygraph test indicated Hipler was being truthful when he gave these statements. A week after filing an alternative presentence investigation report (PSI) and moving for a probationary sentence, Hipler was sentenced to twenty years of imprisonment on the sexual assault charge, with ten years of initial confinement followed by ten years of extended supervision, and a concurrent six-year sentence on the false imprisonment charge, with three years of initial confinement followed by three years of extended supervision.

¶10 Several months later, Hipler, through a new attorney, filed a motion for postconviction relief. Hipler moved to change the guilty verdict to a verdict of acquittal; in the alternative, he requested a new trial, arguing he received ineffective assistance of counsel, that the jury was improperly affected by outside extraneous influences, and that the trial court improperly excluded some expert testimony and erroneously admitted irrelevant expert testimony. The court denied the motion without an evidentiary hearing. Hipler appeals the judgment of conviction and the orders denying postconviction relief.

DISCUSSION

I. ADMISSIBILITY OF DRUG-RELATED TESTIMONY

¶11 Hipler first argues that the trial court erred by allowing K.N. to testify about seeing what appeared to be cocaine in Hipler's bedroom. Hipler argues that this testimony constituted "other acts" evidence and was inadmissible because the evidence was irrelevant and prejudicial. The State counters that K.N.'s testimony regarding the cocaine was admissible evidence because it established a motive for Hipler to sexually assault and imprison K.N. We agree with the State.

¶12 The admission or exclusion of evidence is within the sound discretion of the trial court. ***State v. Volk***, 2002 WI App. 274, ¶17, 258 Wis. 2d 584, 654 N.W.2d 24. "A reviewing court will sustain a discretionary ruling if the trial court examined the relevant facts, applied the proper standard of law and, using a rational process, reached a conclusion a reasonable judge could reach." ***Id***.

¶13 WISCONSIN STAT. § 904.04(2)(a) (2003-04),[1] governs the admissibility of evidence pertaining to other crimes, acts, or wrongdoing, and provides that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶14 To determine whether evidence of other criminal acts is admissible, the trial court is obligated to apply a three-part test under which it must determine whether (1) the evidence was offered for an acceptable purpose; (2) the evidence is relevant; and (3) the probative value of the other acts evidence substantially outweighs the danger of unfair prejudice. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The proponent of the other acts evidence bears the burden of establishing the relevance of that evidence. ***State v. Hunt***, 2003 WI 81, ¶53, 263 Wis. 2d 1, 666 N.W.2d 771. "However, it is the opponent of the admission of the evidence who must show that the probative value of the evidence is substantially outweighed by unfair prejudice." ***Id.*** (citations omitted). Upon review, we may consider other acceptable purposes for the admission of the other acts evidence than those considered by the trial court; we may also affirm the trial court's decision admitting this evidence for reasons other than those stated by the court. ***Id.***, ¶52.

¶15 We conclude that the evidence regarding K.N.'s observation of the cocaine in Hipler's bedroom was properly admitted as other acts evidence under WIS. STAT. § 904.04(2) to prove motive, intent and context. K.N. testified that she inadvertently observed a gallon plastic bag containing white powder, which she assumed was cocaine, when she poked her head into Hipler's bedroom. She also testified that Hipler would not let her leave his apartment immediately thereafter. Later, K.N. testified that Hipler essentially controlled her actions throughout the evening, concluding in the sexual assault. Under these facts, it was reasonable for the trial court to admit the cocaine evidence because it provided a reason for Hipler's conduct. In addition, this evidence was helpful in establishing that Hipler intended to sexually assault K.N. as a means to punish her for observing the cocaine in his possession, and to silence her and prevent her from telling others

what she saw. Finally, as the trial court observed, K.N.'s testimony regarding her observation of the cocaine was part of the whole story leading up to the assault; in other words, this testimony provided context for the eventual assault.

¶16 Hipler argues that the probative value of this evidence, if any exists, is substantially outweighed by its undue prejudicial effect. Hipler also challenges the State's contention that this evidence was admissible for the purpose of establishing motive, pointing to the fact that during closing arguments the prosecutor said that "motive is not an issue in this case." He also asserts that the trial court erred by not providing a limiting instruction to the jury as to how they are to properly consider the other acts evidence. We reject these arguments.

¶17 Hipler fails to develop the first two arguments; we therefore will not consider them any further. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). As for his argument that the court failed to give the jury a limiting instruction, we note that Hipler never requested a limiting instruction and he does not raise this issue in the context of a claim of ineffective assistance of trial counsel. The failure to request an instruction waives any right to review. ***Bergeron v. State***, 85 Wis. 2d 595, 604, 271 N.W.2d 386 (1978).

II. WITNESS TESTIMONY

Linda Friede

¶18 Hipler next argues that the trial court erred by not excluding the lay testimony of Linda Friede; Friede was the nurse who examined K.N. the day after she was assaulted. Hipler asserts that Friede's entire testimony should have been excluded because the State failed to comply with discovery rules by not disclosing within a reasonable time prior to trial its intent to call Friede as a witness, as

required by WIS. STAT. § 971.23(1)(d). The State counters that it disclosed its intent to include Friede as a witness within a reasonable time before trial and therefore no discovery violation occurred. The State further contends that even if Friede's testimony should have been excluded, this error was not prejudicial. We need not consider these arguments because we conclude that Hipler waived the right to object to the admission of Friede's lay testimony.

¶19 During the hearing on Hipler's motion to exclude Friede's testimony, the trial court found that the State failed to disclose within a reasonable time before trial its intent to call Friede as an expert witness. Consequently, the court barred the State from soliciting expert testimony from Friede as a sanction for violating the discovery rules. However, the court ruled that the State would be permitted to examine Friede regarding her observations gained from examining K.N. shortly after the sexual assault took place because the State timely submitted to Hipler medical records which included Friede's observations of K.N. Hipler did not object to this part of the court's ruling. Consequently, we conclude that Hipler waived any objections to Friede's limited testimony. We do not consider this issue further. *See* ***State v. Wolter***, 85 Wis. 2d 353, 373, 270 N.W.2d 230 (Ct. App. 1978) (failure to make a timely objection constitutes waiver of objection).

Expert Witnesses

¶20 Hipler next argues that the trial court erred by not excluding the testimony of the State's expert witness, Lesley Charlton, a psychotherapist at Gunderson Lutheran Medical Center in La Crosse. Charlton offered general testimony about rape trauma syndrome and common behavior among sexual assault victims, including testimony that it is not unusual for some victims to delay reporting rape to law enforcement. Hipler does not challenge Charlton's

qualifications as an expert but argues that Charlton's testimony should have been excluded because it was irrelevant and neither useful nor helpful to the jury. Alternatively, Hipler argues that he should have been allowed to call his own expert witness, Hollida Wakefield, a licensed psychologist, to counter Charlton's testimony.[2]

¶21 The State responds that the trial court properly admitted Charlton's expert testimony because it was helpful in explaining why K.N. delayed reporting the rape to law enforcement. In the alternative, the State argues that any error in admitting such testimony was harmless. The State further maintains that the trial court properly excluded Wakefield's testimony because Wakefield's testimony about rape trauma syndrome and false rape reporting would not have been helpful to the jury. The State further contends that Wakefield was not qualified as an expert regarding false reporting rates. We agree with the State.

¶22 WISCONSIN STAT. § 907.02 governs the admissibility of expert opinion testimony and provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The admissibility of expert testimony lies within the discretion of the trial court. ***State v. St. George***, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777. A trial court erroneously exercises its discretion if it makes an error of law or fails to base its decision upon facts in the record. ***Id***.

[2] Hipler also argues that the jury should have been instructed to ignore Charlton's testimony. This argument is not fully developed. We do not address arguments inadequately developed. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶23 Prior to trial, the State filed a motion in limine to include Charlton's testimony as the State's proffered expert on rape trauma syndrome. At the motion hearing, the trial court concluded that Charlton was qualified as an expert and that her testimony could help the jury understand that it is not unusual for victims of sexual assault to delay reporting the assault to law enforcement. We have found expert testimony to be helpful in explaining victims' behavior as conforming with the common behavior of rape victims. *See* ***State v. Rizzo***, 250 Wis. 2d 407, ¶12, 640 N.W.2d 93 (2002). However, K.N. testified after Charlton and explained that she delayed reporting the assault because Hipler threatened her with a gun. Later in the trial, Hipler sought to have his own expert, Hollida Wakefield, testify. The court prevented Wakefield from testifying and stated that

> [K.N.'s] explanation for her delay [in reporting] is I was threatened with a gun. Would the jury think being threatened with a gun is a reasonable reason to delay? I would think so, without having [an] expert witness tell them that, so you really didn't need an expert in the first place. But I didn't realize that was going to be the reason given by the victim … I don't know a lot of these things until I first hear them [during trial]. And had I known that I wouldn't have found the state's testimony of any real relevance in this case.

¶24 Hipler asserts that because the court eventually determined that Charlton's testimony was irrelevant, the evidence should not have been presented to the jury in the first instance and was therefore "extraneous information." Consequently, Hipler contends, he is entitled to a new trial because of the high probability that Charlton's testimony was prejudicial. We are not persuaded.

¶25 First, we conclude that the trial court's initial ruling admitting Charlton's expert testimony was a proper exercise of discretion. The trial court properly found that Charlton was a qualified expert on rape trauma syndrome, and also properly found that Charlton's testimony would help the jury understand why

a victim of sexual assault would not immediately report the assault to authorities. Expert witnesses, particularly in sexual assault cases, may be utilized "to give an opinion about the consistency of a complainant's behavior with the behavior of victims of the same type of crime" if that testimony will help the trier of fact understand the evidence or determine a fact in issue. *See* ***State v. Jensen***, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988). The court admitted Charlton's testimony in the context of what it understood would be the proof proffered at trial on this topic. We cannot conclude that the court erroneously admitted this testimony under the circumstances then existing.

¶26 Hipler asserts that the verdict should be reversed because the trial court later determined that Charlton's testimony was irrelevant. Hipler reasons that, because Charlton's testimony was irrelevant, it was prejudicial and therefore he should be found not guilty. This argument lacks merit. Hipler fails to explain how Charlton's testimony was prejudicial. The jury learned from K.N. that she hesitated to report the assault to law enforcement because of the gun threat. Placing K.N.'s reason for delaying reporting the assault in the context of Charlton's broader opinion testimony, a reasonable jury would give little weight to Charlton's testimony. We do not see how Hipler was prejudiced by Charlton's testimony.

¶27 We also reject Hipler's argument that he should have been allowed to introduce the testimony of Wakefield to counter Charlton's testimony. Wakefield explained in a letter to Hipler's defense counsel that she would testify to the following information:

> [T]here are several difficulties with Rape Trauma Syndrome….

> The research that exists on rape compares victims of rape to nonvictims. But it does not compare true victims of rape to people who falsely claim rape. There is no research that compares victims of date rape to person who may have consented to sexual contact but later regretted doing so and falsely alleged rape. The crucial question in a criminal case is not whether rape victims are different from nonvictims; it is whether there are symptoms that differentiate between a true victim and a false victim.
>
> ….
>
> 5. There is no research indicating that delayed reporting is more characteristic of actual rape than of falsely alleged rape.
>
> 6. Research demonstrates that clinical experience alone does not provide expertise…. Research shows that the accuracy of clinical judgment and the amount of clinical experience are unrelated. Despite this, professionals often incorrectly believe that their experience enhances their expertise, even when it does not.

The trial court excluded Wakefield's testimony because her testimony was not relevant, was cumulative, and not inconsistent with Charlton's testimony. The court also concluded that Wakefield's proferred testimony would be unhelpful to the jury on the topic of false reporting by rape victims; the court viewed this topic as being in the jury's province and rejected the notion that this was a proper topic for expert testimony.[3] Hipler has not persuaded us that the trial court erroneously exercised its discretion in excluding Wakefield's testimony.

[3] Hipler relies on ***State v. Hamm***, 146 Wis. 2d 130, 430 N.W. 584 (Ct. App. 1988), for the proposition that the trial court erroneously excluded Wakefield's testimony without affording her an opportunity to testify in the form of an offer of proof. Hipler's reliance on ***Hamm*** is misplaced. In ***Hamm***, we concluded that the court had no factual basis for excluding expert testimony, explaining that "[t]he court had heard no testimony from the expert [and] [n]either the prosecution nor the defense knew what the expert's testimony would be …." ***Id***. at 146. In this case, Hipler's counsel fully disclosed the content of Wakefield's proferred testimony; Hipler submitted Wakefield's report to the court, and his defense counsel explained to the court the scope of Wakefield's testimony. There was no reason for the trial court to hear testimony from Wakefield as an offer of proof of what she would have testified about.

III. SENTENCING

¶28 Hipler argues that the trial court erroneously exercised its discretion by not imposing a probation sentence. More specifically, Hipler argues that the trial court failed to consider various mitigating factors and placed undue weight on the gravity of the offense to the exclusion of the other sentencing factors. Hipler also contends that the court "simply adopted the recommendation of the State's presentence investigation … based on the court's predisposed opinion of Hipler's guilt." He complains that the court should have given more consideration to his PSI. We reject these arguments.

¶29 Sentencing is committed to the sound discretion of the trial court. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). Sentence determinations are accorded a presumption of reasonableness and will not be set aside unless the circuit court has erroneously exercised its discretion. ***State v. Schreiber***, 2002 WI App 75, ¶7, 251 Wis. 2d 690, 642 N.W.2d 621. A circuit court properly exercises its discretion by taking into consideration such factors as the gravity of the offense, the defendant's character and rehabilitative needs, and the need to protect the public. ***Id.***, ¶8. A circuit court may also consider other factors such as the defendant's criminal record, the results of a PSI, the viciousness or aggravated nature of the crime, the length of pretrial detention, and the extent to which the defendant is remorseful and repentant for the charged crime. ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). The weight to be given to each factor lies within the circuit court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A court is not required to consider all of the factors in its sentencing determination. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). Therefore, in order to demonstrate an erroneous exercise of discretion, a defendant must show that the record contains

an unreasonable or unjustifiable basis for the circuit court's sentencing decision, resulting in a sentence that is "excessive, unusual, and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Schreiber***, 251 Wis. 2d 690, ¶7.

¶30 The record supports the trial court's sentencing decision. The court considered all of the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

¶31 First, the court properly considered the gravity of the offenses, and the impact of the crimes on K.N. The court noted the serious nature of both crimes, which was aggravated by Hipler's use of a gun. The court also took note of the "tremendous" and "extremely serious" emotional impact the crimes had on K.N.

¶32 The trial court also properly considered Hipler's character. The court rejected the results of the polygraph test that Hipler took prior to sentencing, noting that a polygraph test lacks any evidentiary value. The court also took note of several crimes that Hipler had committed in three other counties, two of which were batteries; the court observed that Hipler was out on bail for the two batteries when he committed the instant crimes. The court found this conduct to be a good indicator of Hipler's inability to comply with the terms of bail, indicating how Hipler would likely perform if sentenced to a probationary term. At the sentencing hearing, Hipler refused to accept any responsibility for his crimes, clearly disavowing any guilt. The court also took this into consideration when sentencing Hipler. The court considered information relating to claims that Hipler

was a drug dealer and had problems with drug use. As such, the record plainly demonstrates that the court properly considered Hipler's character before imposing sentence.

¶33 In addressing the need to protect the public, the court discussed the threat Hipler poses to others based on the PSI's assessments that Hipler "could become aggressive, even violent under certain circumstances," and that the PSI investigator "[c]ould not rule out potential for dangerous violence." The court concluded that "[w]hether or not ... the public needs protection from him, certainly this victim did." However, in its risk evaluation, the court concluded, in Hipler's favor, that despite Hipler's past drug use and incidents of committing crimes while out on bail, the court would impose a lesser sentence than it had in a previous, more violent, rape case, due to a lack of prior history of violence towards women or prior felony convictions. The court properly considered the risk Hipler posed to the public prior to imposing sentence.

¶34 Hipler contends that the circuit court failed to consider various mitigating circumstances prior to sentencing him. This argument lacks merit. At the beginning of the sentencing hearing, the court stated that it read and considered letters from family members and non-family members. The court also stated that it reviewed certificates of compliance submitted to the court demonstrating Hipler's compliance with various jail programs. In any event, the amount of weight a court assesses to any particular factor is left to the court's broad discretion, as long as the court properly considers the relevant factors. *See* ***State v. Larsen***, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987).

¶35 Hipler next argues that the court should have imposed the sentence that the author of his alternative PSI recommended. This argument is also without

merit. The court is not bound to any recommendations made either by counsel or by PSI authors. *See* ***State v. Johnson***, 158 Wis. 2d 458, 464-65, 463 N.W.2d 352 (Ct. App. 1990).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

¶36 Hipler next argues that he received ineffective assistance of counsel in a number of respects, both prior to and during trial. Hipler argues that his defense counsel provided ineffective assistance by (1) refusing to arrange for him to take a polygraph examination to verify the statements he gave to police; (2) advising him that any testimony he gave at trial should conform to the statement he gave police; (3) failing to "adequately cross-examine and/or impeach the testimony and credibility of the State's witnesses, and ... fail[ing] to adequately examine the defense witnesses"; (4) failing to request a specific curative jury instruction after the trial court determined that Charlton's testimony was irrelevant; (5) failing to object to improper, inflammatory, and prejudicial remarks from the prosecutor during closing arguments; and (6) failing to demand a new trial because of information that the jury verdict was affected by an extraneous or outside influence. Hipler also argues that "the net effect of all errors … rendered Nelson's assistance ineffective." We disagree with all these contentions and conclude that Hipler fails to establish that he received ineffective assistance of counsel.

¶37 To prove ineffective assistance of counsel, a defendant must show that the attorney's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Performance is deficient if it falls outside the range of professionally competent representation,

but in undertaking this analysis it is strongly presumed that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 636-37. To establish prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for the attorney's error, there is a reasonable probability the result of the trial would have been different. ***Strickland***, 466 U.S. at 694; ***Erickson***, 227 Wis. 2d at 773.

¶38 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***Pitsch***, 124 Wis. 2d at 633-34. Upon appellate review, we will affirm the trial court's findings of fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 634. However, the ultimate question of effective assistance, i.e., whether the representation was deficient and whether the deficient performance prejudiced the defendant, is a question of law, which we review de novo. ***Id.***

¶39 We conclude that all but one of the ineffective assistance of counsel arguments Hipler makes are conclusory and not fully developed. The only argument we consider sufficiently developed and warranting our attention is in relation to counsel's failure to adequately cross-examine Charlton on rape trauma syndrome. As to the balance of Hipler's ineffective assistance of counsel arguments, because they are undeveloped we consider them no further. ***Pettit***, 171 Wis. 2d at 646-47.

¶40 As for counsel's alleged failure in conducting an adequate cross-examination of Charlton on rape trauma syndrome, Hipler has not demonstrated prejudice. The primary purpose for Charlton's testimony was to help the jury

understand why a victim delays reporting the sexual assault to law enforcement. However, as we explained earlier, the court determined Charlton's testimony to be irrelevant after K.N. testified that she delayed reporting the sexual assault because Hipler threatened her with a gun. Hipler fails to demonstrate how he was prejudiced by defense counsel's alleged inadequate cross-examination of Charlton.

¶41 Hipler also argues that the combined effect of defense counsel's errors resulted in ineffective assistance. Because we reject all of Hipler's arguments that counsel was ineffective, we reject this argument as well.

V. POSTCONVICTION HEARING

¶42 Hipler argues that the trial court erred in denying his motion for postconviction relief without an evidentiary hearing. We disagree that an evidentiary hearing on Hipler's postconviction motion was required.

¶43 A defendant is not automatically entitled to a postconviction evidentiary hearing; a hearing is required only if the motion alleges facts which, if proven true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Under ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d. 629 (1972), we apply a two-part test to determine whether a trial court properly exercised its discretion in denying an evidentiary hearing to consider a defendant's postconviction motion for relief. ***Bentley***, 201 Wis. 2d at 310. "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." ***Id.*** (citing ***Nelson***, 54 Wis. 2d at 497). This is a question of law, which we review de novo. ***Bentley***, 201 Wis. 2d at 310. If, however, the defendant has not alleged sufficient

facts, the trial court may exercise its discretion to deny the motion without a hearing based on any of the three ***Nelson***[4] factors. ***Id.*** at 310-11. We review a circuit court's discretionary act applying the erroneous exercise of discretion standard. ***Id.*** at 311.

¶44 Hipler argues that because the court did not hold an evidentiary hearing on his postconviction motion, he was "denied the opportunity to make a complete record of the issues, specifically as to whether the jury was improperly influenced by extraneous information." Hipler further argues that in not holding such a hearing, the court "failed to consider the highly prejudicial impact of expert testimony on a jury."

¶45 We conclude that the trial court did not erroneously exercise its discretion by denying Hipler an evidentiary hearing on his postconviction motion. Regarding Hipler's claim of ineffective assistance of trial counsel for advising him to testify at trial consistent with the statement he gave to the police on April 9, 2003, the trial court concluded that even under the facts as alleged in the motion, Hipler was not entitled to a new trial. Regarding the other grounds for asserting ineffective assistance of trial counsel, the court rejected Hipler's claim that counsel was ineffective for failing to cross-examine Charlton and for failing to request a curative instruction regarding Charlton's testimony, because he failed to demonstrate how he was prejudiced by these failures. Hipler has not persuaded us that an evidentiary hearing was necessary for the court to resolve these issues.

[4] ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d. 629 (1972), established that a court may deny a motion without an evidentiary hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.*** at 497-98.

¶46 We also reject Hipler's arguments that the trial court improperly denied him an evidentiary hearing on his postconviction motions, because his arguments on appeal are conclusory and not fully developed. In addition, Hipler complains that the trial court improperly denied him the opportunity to "make a complete record of the issues" at a postconviction motion hearing. He fails to explain what that complete record would demonstrate and how that record would effectuate a different result.

By the Court.—Judgment and orders affirmed.

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