COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP1255 **Cir. Ct. No. 2001CF5455**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MC WINSTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. MC Winston appeals from an order denying his motion for a new trial. The issues are whether postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness in six respects, and for failing to seek "new" DNA testing in his original postconviction motion. We

conclude that his claims were either insufficiently asserted, or lacking the demonstrable prejudice required for an ineffective assistance claim. Therefore, we affirm.

¶2 Winston was charged with one count of second-degree sexual assault (sexual intercourse) of a fifteen-year-old child. The charge was amended to second-degree sexual assault on the basis of sexual contact. After the jury was unable to reach a verdict, the trial court ordered a mistrial. The State then moved to amend the information to add a charge of second-degree sexual assault resulting in two charges, one for sexual contact, the other for sexual intercourse. That case was tried to a different jury, which found Winston guilty of the contact charge and not guilty of the intercourse charge. The trial court imposed a thirty-year sentence comprised of twenty- and ten-year respective periods of confinement and extended supervision. Winston moved for postconviction relief, seeking a new trial on the bases of evidence he claimed was exculpatory and newly-discovered, because of ineffective assistance of trial counsel relating to that very same evidence, and for failing to impeach several witnesses on claimed discrepancies in their testimony. He also sought a new trial in the interest of justice based on the evidence previously challenged. The trial court summarily denied the postconviction motion. This court affirmed the judgment and order in an extensive sixteen-page opinion. *See* ***State v. Winston***, No. 2003AP3412-CR, unpublished slip op. ¶1 (WI App Sept. 8, 2004) ("***Winston I***").

¶3 Winston then filed a second postconviction motion, this time *pro se*, alleging that his (former) postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness in six respects, and for failing to seek "new" DNA testing. The trial court summarily denied the motion because certain claims were lacking specificity or record support, and others failed to demonstrate that if

indeed counsel had been ineffective, there was no demonstration that the claimed ineffectiveness prejudiced Winston. It is from this postconviction order that Winston appeals.

¶4 To avoid the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), which requires a sufficient reason for failing to raise all postconviction challenges on direct appeal or in defendant's original, supplemental or amended postconviction motion, Winston alleges that he was unable to raise these ineffective assistance claims previously because he was represented by ineffective counsel in his first postconviction motion and on direct appeal. *See* ***id.*** Whether ***Escalona***'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). We accept that reason as sufficient and address Winston's claims.

¶5 Winston alleges that postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness for failing to: (1) move to suppress evidence obtained with an allegedly defective warrant; (2) adequately challenge the State's motion to amend the information to add the sexual assault (by contact) charge; (3) comply with ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986), which prohibits discrimination as a basis for striking a potential juror; (4) call as a defense witness Daniel Robinson, a fact witness who could allegedly discredit the victim and her friend; (5) impeach particular witnesses on claimed inconsistencies and discrepancies; and (6) challenge the trial court's jury instructions on sexual contact (as constituting a sexual assault).[1] Winston also alleges that

[1] Winston actually frames issues five and six as one, challenging the sufficiency of the evidence. We consider them separately because the substance of his allegations are not to the (continued)

postconviction counsel was directly ineffective for failing to seek "new" DNA testing.

¶6 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

> As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the ***Bentley*** standard allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.

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sufficiency of the evidence, but to counsel's effectiveness for failing to impeach certain witnesses, and for failing to challenge a particular jury instruction.

Id., ¶23 (footnote omitted).

¶7 To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one element, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶8 Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91. Specifically, "[w]e will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment." ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983).

¶9 Winston's first claim is that the evidence seized should have been suppressed because it was recovered pursuant to a defective arrest warrant, in that it identified Winston's son as the target, rather than Winston. The arrest warrant

in the record bears Winston's name; he claims that the warrant used to arrest him was a warrant different from the warrant in the record.

¶10 We cannot consider an alleged warrant that is not in the record; we are obliged to rely on the arrest warrant in the record. *See* ***Howard v. Duersten***, 81 Wis. 2d 301, 307, 260 N.W.2d 274 (1977).[2] Consequently, Winston has not established that he was arrested on a defective warrant.

¶11 Winston's second claim of ineffective assistance is trial counsel's failure to adequately oppose the State's motion to amend the information. After the mistrial on the sexual assault charge (by contact), the State moved to amend the information to add another second-degree sexual assault charge, this one for sexual intercourse. The trial court granted the motion despite Winston's opposition. The trial court properly exercised its discretion in granting the motion to allow the State to amend the information to include another sexual assault charge involving the same individuals, the same date, and the same type of conduct against which Winston was already defending himself. Winston also seemingly claims that amending the information somehow violated his right against Double Jeopardy, alluding to the earlier mistrial. The Double Jeopardy clause rarely bars a retrial after the defendant moves for a mistrial. *See* ***State v. Hill***, 2000 WI App 259, ¶11, 240 Wis. 2d 1, 622 N.W.2d 34. Here, the amendment charging a different sexual act between these two individuals does not constitute Double Jeopardy. Consequently, Winston has not demonstrated the

[2] Notwithstanding Winston's inability to obtain the warrant he claims was actually used to arrest him, the appellate record contains a valid arrest warrant. We cannot rely on Winston's uncorroborated allegations that he was arrested pursuant to his son's parole warrant, when a valid arrest warrant for Winston is in the appellate record.

prejudice necessary to maintain an ineffective assistance claim. *See* ***Strickland***, 466 U.S. at 694.

¶12 Winston's third ineffective assistance claim involves trial counsel's alleged elimination of men from the jury. *See* ***Batson***, 476 U.S. at 89 (the Equal Protection Clause prohibits the prosecutor from challenging a potential juror solely on the basis of race); ***J.E.B. v. Alabama ex rel. T.B.***, 511 U.S. 127, 144-45 (1994) (the Equal Protection Clause prohibits a party from challenging a potential juror solely on the basis of gender).[3] Winston contends that he was harshly judged by the jury in part because it consisted entirely of women. We reject that contention.

¶13 First, this same all female jury acquitted Winston of the sexual assault involving intercourse and convicted him only of the sexual assault involving contact. This result blunts Winston's contention. Second, appellate counsel declined to raise this claim on direct appeal because trial counsel's strategic reason for favoring female jurors was his belief that they would be more critical of the victim than male jurors would be. That defense strategy was reasonable, and thus, "virtually unchallengeable." ***Strickland***, 466 U.S. at 690-91. Consequently, an ineffective assistance claim cannot be maintained on this basis. *See* ***id.***

¶14 Winston next claims that failing to call Daniel Robinson as a defense witness to discredit the victim and her friend, constituted ineffective assistance.

[3] The parties refer to the alleged elimination of men from the jury as a ***Batson*** claim because ***Batson*** is the seminal case precluding discrimination as a basis for striking a potential juror from the *voir dire* panel. *See* ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986) (prohibits racial discrimination). Winston's specific challenge however, is governed more specifically by ***J.E.B. v. Alabama ex rel. T.B.***, 511 U.S. 127, 144-45 (1994), which prohibits gender discrimination.

He does not demonstrate, however, how Robinson's testimony was necessary to render his acquittal reasonably probable, which is essential to his maintaining an ineffective assistance claim. *See* ***id.*** at 694.

¶15 First, Winston merely alleges what he claims would have been Robinson's testimony. These conclusory allegations are insufficient to meet the requisites for an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9; ***Bentley***, 201 Wis. 2d at 310-11. Robinson's prospective testimony is inadequately proffered. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶16 Second, much of Robinson's alleged prospective testimony could have been established by other witnesses, principally Winston himself when he testified in his defense. Consequently, Winston has not established the necessity of Robinson's testimony. *See* ***Strickland***, 466 U.S. at 694.

¶17 Winston's fifth claim is alleged as challenging the sufficiency of the evidence; substantively however, it challenges trial counsel's failure to impeach certain witnesses on inconsistencies and discrepancies in their testimony, and his failure to challenge a particular jury instruction. The alleged inconsistencies and discrepancies deal with the DNA evidence found on the victim, and various legally insignificant facts about which various witnesses testified. The alleged discrepancies regarding the collection of DNA evidence (such as what part of the victim's breast was swabbed) become legally insignificant because the victim testified that Winston had sucked on (at least) one of her breasts and Winston would not deny that it was his DNA on her face, hair and the front part of her shirt. Although he claims that he could have accidentally spit on the victim while

laughing at a joke, the jury found otherwise.[4] Likewise, who the witnesses walked to school with, or how much money the victim had been given that day (the victim's mother testified that she had given her $8.00 for lunch and bus fare, while the victim testified she only had $.75) are not sufficiently significant to claim that it was reasonably probable that (further) impeachment by trial counsel would have resulted in Winston's acquittal on the sexual contact charge. Counsel is not ineffective for failing to impeach a witness on the basis of minor inconsistencies that would not have affected the verdict. *See* ***State v. DeLeon***, 127 Wis. 2d 74, 85, 377 N.W.2d 635 (Ct. App. 1985). Consequently, Winston has not shown the prejudice necessary to maintain an ineffective assistance claim since it is not reasonably probable that any of the proffered challenges would have resulted in an acquittal on the sexual assault by contact charge. *See* ***Strickland***, 466 U.S. at 694.

¶18 Winston's final ineffective assistance claim against trial counsel (through postconviction counsel) was for failing to challenge the jury instruction defining sexual contact for failing to refer to mouth to vagina, or mouth to penis contact. Winston's challenge is to the verbatim language of WIS JI—CRIMINAL 2101A, which defines sexual contact. The absence of references to examples of various types of sexual contact is not a legitimate basis to challenge WIS JI—CRIMINAL 2101A. Winston has not shown that defense counsel's performance

[4] Winston confuses "[t]he rule that the evidence must exclude every reasonable hypothesis of innocence" with our standard of (appellate) review. "[T]he rule that the evidence must exclude every reasonable hypothesis of innocence refers to the evidence which the jury believes and relies upon to support its verdict." ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). Our (appellate) standard of review is that "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507.

was deficient for failing to challenge the trial court's instructing the jury verbatim on WIS JI—CRIMINAL 2101A. *See* ***McMahon***, 186 Wis. 2d at 80.

¶19 Winston also directly challenges the effectiveness of his postconviction counsel for failing to move for a "new" DNA test. Winston returns to his previous challenge to the alleged mishandling of his blood sample, claiming that he was entitled to "new DNA testing under [WIS. STAT. §] 974.07." For many reasons, including his inability to comply with § 974.07(2) (created Sept. 1, 2001), which requires an allegation of the relevance of the evidence and the proposed testing, we reject his challenge. A principal reason we reject his challenge is that we previously decided that the allegedly mishandled blood sample "was not material to his guilt or innocence, irrespective of how it might have been handled." *See* ***Winston I***, No. 2003AP3412-CR, unpublished slip op. ¶23. We will not revisit that previously rejected issue. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).