COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1766 **Cir. Ct. No. 1991CF911761**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAIN RICHARD WELSH, JR.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Alain Richard Welsh, Jr., *pro se*, appeals from an order denying without a hearing his WIS. STAT. § 974.06 (2007-08) [1] motion for

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

postconviction relief and an order denying his motion for reconsideration. We conclude the trial court appropriately denied Welsh's motions and affirm.

BACKGROUND

¶2 In February 1992, Welsh was convicted of one count of second-degree sexual assault of a child for having a sexual relationship with Katie F., who was thirteen years old at the time of the assault. Welsh took direct appeal of his case and we summarily affirmed the judgment of conviction. *See* ***State v. Welsh***, No. 92-0727-CR, unpublished slip op. (Wis. Ct. App. June 18, 1993).

¶3 Nearly fifteen years later, on May 30, 2008, Welsh filed a WIS. STAT. § 974.06 motion, alleging multiple errors, such as a speedy trial violation, insufficient evidence, ineffective assistance of counsel, and judicial misconduct. The trial court denied the motion as procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

¶4 Welsh moved for reconsideration, arguing that he failed to raise issues in his first appeal due to ineffective assistance of postconviction/appellate counsel, who was the same attorney representing Welsh at trial. The court again denied the motion, this time stating it had reviewed the record and none of Welsh's claims had merit.[2] Welsh appeals.

[2] The court also noted that Welsh offered no explanation for why he raised ineffective assistance for the first time in the reconsideration motion and not the original WIS. STAT. § 974.06 motion.

DISCUSSION

¶5 WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, it was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. ***Escalona***, 185 Wis. 2d at 185. Thus, a prisoner who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. ***Id.***

¶6 Claims of ineffective assistance of trial counsel must be raised in the trial court in a postconviction motion prior to a direct appeal. *See* WIS. STAT. RULE 809.30(2)(h). Therefore, postconviction counsel's failure to raise ineffective assistance of trial counsel may present a "sufficient reason" to overcome the ***Escalona*** procedural bar. *See, e.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996).

¶7 Welsh appears to assert that under ***Rothering***, the simple fact that trial, postconviction, and appellate counsel were the same attorney automatically gets him around the ***Escalona*** bar. This conclusion is incorrect: ***Rothering*** indicates only that it is "particularly true" that some proof issues or factual questions overlap "where trial, postconviction and appellate counsel was the same attorney." ***Id.*** at 682. When an ineffective assistance of postconviction counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish trial counsel actually was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶8 To prevail on a claim of ineffective assistance of trial counsel, Welsh must show that counsel was deficient and the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. A defendant must successfully show both deficiency and prejudice, so if one prong is unfulfilled, we need not address the other. ***State v. Manuel***, 2005 WI 75, ¶72, 281 Wis. 2d 554, 697 N.W.2d 811.

¶9 To prove deficiency, a defendant must demonstrate that counsel's conduct falls below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, the defendant must show 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." ***Id.*** at 694.

¶10 Ineffective assistance claims present us with mixed questions of fact and law. ***Mayo***, 301 Wis. 2d 642, ¶32. The trial court's findings of historical fact will be upheld unless clearly erroneous; whether those facts constitute a deficiency or amount to prejudice are determinations we review *de novo*. ***Id.***

¶11 A postconviction ***Machner*** hearing is a prerequisite to appellate review of ineffective assistance claims. ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998); ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a trial court may deny a postconviction motion without a hearing if the defendant fails to allege sufficient facts entitling him or her to relief or presents only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief. ***State v. Allen***, 2004 WI 106, ¶10, 274 Wis. 2d 568, 682 N.W.2d 433; ***State v. Bentley***, 201 Wis. 2d 303, 309-

10, 548 N.W.2d 50 (1996). We discern six specific claims of counsel's error in Welsh's brief.[3]

I. Failure to Call Bridget Robinson as a Witness

¶12 Welsh alleges trial counsel was ineffective for failing to call Bridget Robinson as an alibi witness. According to Welsh's appellate brief, Robinson would have testified that on May 6, the day for which Welsh was charged, "she was physically present [within] the defendant's bedroom and [while] she was there her and the defendant has a sexual relationship and at no time did she ever see Katie F, within the defendant[']s] bedroom with them." Robinson also would allegedly have testified that the investigating sheriff's deputy, George White, had attempted to intimidate her.

¶13 In order to be preserved for appeal, an issue must first be presented, with sufficient specificity and particularity, to the trial court. ***State v. Caban***, 210 Wis. 2d 597, 604-06, 563 N.W.2d 501 (1997). The trial court is not required to make leaps of logic to determine what a defendant *might* be alleging: Welsh was

[3] In the opening pages of his brief, Welsh identifies a multitude of claimed errors unrelated to counsel's performance, including complaints about an illegal arrest, a speedy trial violation, an unfair trial, perceived judicial bias or misconduct, and deprivation of due process for being held in contempt of court. Welsh also insists that, because he is a *pro se* prisoner, we must liberally construe his pleadings, "however inartfully pleaded[.]" *See* ***Haines v. Kerner***, 404 U.S. 519, 520 (1972).

Although we are more lenient with *pro se* prisoners' pleadings, *see* ***State v. Love***, 2005 WI 116, ¶29 n.10, 284 Wis. 2d 111, 700 N.W.2d 62, and ***State v. Wood***, 2007 WI App 190, ¶17 n.7, 305 Wis. 2d 133, 738 N.W.2d 81, this leniency is not license to construct a laundry list of potential errors and other grievances and call it an appellate brief. We will not, in granting leniency, abandon our neutrality to develop arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). *Pro se* litigants are not excused from their obligations under WIS. STAT. RULE 809.19(1)(e) to cite to the record and to authorities to support their claims. We therefore do not consider Welsh's unexplained, underdeveloped, and unsupported arguments. *See* ***M.C.I., Inc.***, 146 Wis. 2d at 244-45.

required to make sufficient factual allegations showing he was entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶¶13-14.

¶14 In his motion to the trial court, however, Welsh alleged that "Bridget testified[[4]] that she spent most of her visit in Welsh's bedroom" and "Robinson, a romantic friend, stated as well that she did not see Welsh drink or do drugs[,]" and that counsel was ineffective "for not adequately investigating and preparing for trial by not having used the information contained herein." In other words, Welsh did not specifically allege counsel was ineffective for failing to call Robinson. He did not identify Robinson as an alibi witness and he did not tell the trial court what testimony she would have offered had she been called. Claims of error relating to trial counsel's failure to call Robinson as a witness are not properly preserved.

II. Failure to Use Private Investigators' Information

¶15 Two private investigators, Matt Stein and Norbert Kurczewski, worked on the case. Welsh argues on appeal that trial counsel was ineffective for failing to use the evidence obtained by each and for failing to call Stein as a witness. However, Welsh makes absolutely no reference to either investigator in his motion for relief. That alone amounts to waiver. *See* ***id.*** (must allege sufficient facts); ***Caban***, 210 Wis. 2d at 604-06 (must present issue to trial court).

¶16 Further, Welsh does not identify, even on appeal, what evidence either investigator would have offered or what Stein's testimony would be. He alleges only that Kurczewski possessed "information and evidence that Katie F.

[4] Welsh was on parole at the time of the alleged offense; several people testified at his revocation hearing.

was in fact Fabricating this story," but this allegation is too conclusory to merit further review. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Welsh does not identify what this evidence is, its type, or its source, and he has not indicated how it is any better evidence than what was actually presented at trial. In short, Welsh has not shown how counsel was deficient for failing to utilize information from the investigators and, in the absence of specific facts supporting his claim, he has also failed to show any prejudice.

III. Failure to Call Richard Shaw as a Witness

¶17 Welsh contends trial counsel should have called Richard Shaw, who "would have testified that he did not witnesses [sic] or see Katie F. within the residence and at no time did he see Alain Welsh use drugs or drink."[5] Shaw also would have testified he was at Welsh's house from 6:30 p.m. on May 5 to 3:30 a.m. on May 6 and was in Welsh's bedroom off and on over those nine hours.

¶18 Again, in arguing error to the trial court, Welsh only stated that "Richard Shaw, a family friend, stated that he did not see Welsh drink alcohol or smoke marijuana." He did not allege counsel was ineffective for failing to call Shaw. To the extent Shaw was intended as an alibi witness, three other defense witnesses provided similar testimony, and Welsh does not indicate how the omission of cumulative testimony prejudiced his defense. *See* WIS. STAT. § 904.03 (relevant evidence may be excluded if it is cumulative); ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue meritless issues).

[5] Welsh apparently makes repeated references to drugs and alcohol because Katie F. alleged he provided them to her.

IV. Failure to Appropriately Question Defense Witness Marie Dyble

¶19 Marie Dyble was called to testify for Welsh. He complains trial counsel was ineffective for failing to question her about an alleged conversation "in which Katie informed [her] that she was giving the Judge and her social worker an snow job regarding this case[.]" Again, Welsh failed to make any allegation in the trial court relating to Dyble's examination.

¶20 Counsel did in fact ask Dyble: "[D]id Katie [F.] ever make a statement regarding Alain Welsh and the incident of May 6?" Dyble replied that Katie "stated that she had been over there drinking and doing drugs, and that he had seduced her is what she had originally used [sic]." To the extent Welsh is suggesting counsel should have asked additional questions to elicit information about the conversation he identifies, he offers nothing to suggest counsel had or should have known about it at the time and he offers no information supporting his claim that Dyble actually had such a conversation with Katie. He has not shown counsel was deficient in questioning Dyble.

V. Failure/Inability to Call a Former Police Chief as a Witness

¶21 Welsh wanted counsel to call then-police chief Philip Arreola to testify. The court refused, stating "I can't imagine how that would be relevant." Welsh argues counsel should have told the court she was calling Arreola "to show that the investigating Detective [White] was in violation policy and procedures of the Police Department which state no friends or family members can participate in any criminal investigation … regarding a family member or friend as this is a clear conflict of interest and thus making any information obtain unusable and tainted." Welsh essentially argues on appeal that if counsel had made this argument at trial, the court would have permitted her to call Arreola.

¶22 Counsel did, in fact, make such an argument. She explained Arreola's testimony was relevant because White had intimidated the witnesses, and because White was a friend of the victim's father. The court still held Arreola's testimony would be irrelevant. Counsel was therefore not deficient; she made the exact argument Welsh thinks she should have put forth. The simple fact that the court still ruled against Welsh does not mean there was ineffective assistance.[6]

VI. Errors Related to Detective George White

¶23 Welsh also complains that he was not allowed to call Detective George White. He insists that White, a friend of Katie's father, was intimidating witnesses and both fabricating and destroying evidence and complains trial counsel "allowed" the court to "deny [him] the right" to call White to the stand.[7]

¶24 The court refused to let counsel call White because it concluded that testimony about his investigation was irrelevant on direct examination. The court noted that none of White's witnesses had testified they had been intimidated. Further, the court explained that if the State chose to rebut Welsh's alibi witnesses by using statements allegedly falsified by White or other allegedly fabricated

[6] This was an issue we addressed on direct appeal; when it was alleged the trial court erred in its refusal to permit Arreola's testimony, we noted that although counsel's failure to show a better nexus might arguably have supported a claim of deficient performance, we noted that White's relationship with Katie's father had no direct relevance to evidence presented at trial. In other words, we discerned no prejudice. Further, Welsh did not then and does not now identify the specific portion of the policy he seeks to invoke.

[7] Welsh also complains that counsel did not call Robinson to testify about White's intimidation and was not permitted to call Arreola to testify about department procedure to establish White was in violation of that procedure; those complaints have already been addressed in the sections relative to those witnesses.

evidence, then calling White to ask about his techniques might be relevant. However, the court declined to permit Welsh to call White and confuse the issues with a mini-trial. *See* WIS. STAT. § 904.03 ("evidence may be excluded if its probative value is substantially outweighed by the danger of … confusion of the issues, or misleading the jury"). The court's refusal is not counsel's acquiescence—that is, counsel was not ineffective simply because the court refused to let her call a witness.[8]

VII. Other Issues

¶25 Welsh also makes several general claims of error about his attorney's performance. He complains she asked irrelevant and leading questions and allowed the judge "to intimidate her to the point where she just stopped trying to defend" Welsh. These conclusory allegations are insufficient: they identify no specific error on counsel's part. Indeed, simply because a court rules adversely to a party does not mean that the attorney was deficient or that the attorney "allowed" the court to make the adverse ruling.

¶26 Welsh's appeal fails because the arguments are nothing more than conclusory, unsupported allegations insufficient to justify relief, and many of the complaints were never raised in the trial court. The trial court appropriately denied the WIS. STAT. § 974.06 motion for relief without a hearing because Welsh failed to raise sufficient facts entitling him to relief. Because Welsh did not show trial counsel was ineffective, postconviction counsel's failure to raise trial counsel's effectiveness does not form a basis for relief.

[8] Also, Welsh never alleged in his postconviction motion that trial counsel was ineffective for any reason relating to White, although he does allege White acted improperly.

¶27 Welsh also attempts to bring a ***Knight*** petition alleging ineffective assistance of appellate counsel. *See* ***State v. Knight***, 168 Wis. 2d 509, 520-22, 484 N.W.2d 540 (1992). The State alleges the petition is procedurally improper and substantively meritless. We agree that a ***Knight*** proceeding is separate and distinct from a direct appeal.[9]

¶28 However, Welsh's petition also fails on its merits. Much of the petition overlaps the issues in the current appeal. To the extent the ***Knight*** petition alleges appellate counsel was ineffective for failing to challenge the efficacy of trial counsel, and for failing to challenge postconviction counsel's failure to challenge trial counsel, Welsh has not shown trial counsel was ineffective.

¶29 Welsh also alleges appellate counsel was ineffective for failing to challenge the sufficiency of the evidence. He claims there was no physical evidence he had a sexual relationship with Katie and no evidence of Katie's age. However, Katie testified that she had intercourse with Welsh and she testified as to both her age and her date of birth. This is sufficient: testimony is a type of evidence, and Welsh provides no authority for his implicit argument that the State needed to prove these elements with documents instead of testimony. To the extent Welsh launches a credibility challenge against Katie's testimony, witness credibility is resolved by the fact-finder. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

[9] We also note that Welsh's petition is not properly verified. *See* ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶11, 288 Wis. 2d 707, 709 N.W.2d 515.

By the Court.—Orders affirmed.

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