COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2379-CR

Cir. Ct. Nos. 2006CF901
2006CM6134

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN J. LELINSKI,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Steven J. Lelinski appeals from judgments entered after a jury found him guilty of second-degree sexual assault with use or threat of force, attempted second-degree sexual assault with use or threat of force, lewd and lascivious behavior and fourth-degree sexual assault, contrary to WIS. STAT.

§§ 940.225(2)(a), 939.32, 944.20(1)(b) and 940.225(3m) (2005-06).[1] He also appeals from an order denying his postconviction motion. He raises five arguments on appeal: (1) there was insufficient evidence to support the conviction on second-degree sexual assault; (2) the trial court erroneously exercised its discretion in allowing in "other acts" evidence; (3) the trial court erroneously exercised its discretion in denying his motion for severance and granting the State's motion for joinder; (4) the trial court erred in summarily denying his claim of ineffective assistance of counsel without conducting a ***Machner*** hearing;[2] and (5) the sentence imposed was unduly harsh. Because we resolve each assertion in favor of upholding the verdict, we affirm.

BACKGROUND

¶2 On February 13, 2006, the State filed a complaint charging Lelinski with second-degree sexual assault, attempted second-degree sexual assault, and lewd and lascivious behavior for conduct he engaged in at the home of Amanda R. on October 18, 2005. Amanda told police that she awoke at 2:00 a.m. to find Lelinski at her home. He was dressed in plain clothes and entered her home. Amanda recognized Lelinski as she had met him in August 2005 when he came to her neighborhood two separate times to conduct police investigations. Amanda then moved from that area and a short time later, noticed a squad car repeatedly passing by her new residence. The squad car eventually stopped and Amanda recognized that the officer was Lelinski. On October 15, 2005, Amanda noticed a

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

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

uniformed officer inspecting her car, which was parked outside. When Amanda came out, she noticed that it again was Lelinski. He left shortly thereafter, but began calling her and stopping by. He indicated he just wanted to check on her, told her she was pretty and that he was intrigued by her. She told him she did not want him stopping by.

¶3 When he arrived in the early morning hours of October 18, 2005, he offered Amanda money and he sat down on her couch. He asked her how much it would cost for a private dance and reminded her that she had an outstanding warrant. He moved closer to her and grabbed her arm, pulling her down onto the couch. He rubbed her breast over her clothes and then under her clothes. He was leaning over her and she could not get up. He unzipped his pants, started masturbating and grabbing her by the hair, attempted to force her mouth onto his penis. He then ejaculated, pushed her away, threw a twenty-dollar bill on the floor and told her to expect police to come and arrest her on a warrant. A few days later, she reported the incident to police.

¶4 The State then filed an amended complaint containing the same charges against Lelinski with respect to Amanda, but adding two counts of third-degree sexual assault with respect to a second victim, Myrtle M. Myrtle stated that she met Lelinski in August 2002 as he had placed several children in her home. When she contacted him about getting the children back to their own home, he told her to meet him at the police academy. When she arrived, he indicated he thought she would have come alone, asked her about wearing a skirt and if she wanted to go into the basement to have sex. She said no and left.

¶5 She contacted Lelinski again for his assistance in returning the kids to their home. He indicated he was busy, but the next day, Lelinski startled Myrtle

who had opened her apartment door to throw out some trash and found him standing there. Lelinski was in full uniform with gun and gun belt. He followed her into the apartment and into her bedroom. He began kissing her breasts and pushed her down onto the bed and began oral sex on her. Myrtle was scared and uncomfortable. Lelinski then stopped and put a twenty-dollar bill on the dresser. She tried to walk around him to get away, but he grabbed her and asked her to have sex. When she said no, he pulled on the robe she was wearing and asked her for oral sex. Myrtle indicated that although she did not want to, she took Kleenex, put it on his erect penis and put her mouth on the Kleenex, moving it up and down about five times before she gagged. Lelinski then used his hand until he ejaculated into a towel. He wanted to take the towel, but Myrtle said she would wash it.

¶6 Lelinski entered not guilty pleas and filed a motion seeking to sever the Myrtle charges from the Amanda charges. The State opposed the motion and the trial court implicitly denied the motion to sever on August 9, 2006. Before trial, the State filed another complaint charging him with fourth-degree sexual assault against a third victim, Josephine G. On January 15, 2005, Josephine had called police following a fight with her brother. Josephine was wanted on a 2004 prostitution warrant and did not want to be arrested, so she gave Lelinski a false name. Her brother, however, provided her real name and when Lelinski confronted her, she admitted she had lied to avoid arrest on the warrant. Lelinski told her she would be arrested and took her into the bedroom. He asked if she was wearing anything under the shirt she had on and she told him she was not. He lifted her shirt, pulled her close to him and commented on her body. He then slapped her naked buttocks and told her she had a "nice snatch." Josephine indicated that Lelinski then gave her his name and personal cell phone number,

telling her to call if she needed anything. Following this incident, Lelinski started coming over and asking her when she would be home alone.

¶7 The State moved to consolidate the Josephine count with the other complaint and the trial court granted the motion. Prior to trial, the State filed a motion *in limine* seeking to admit "other acts" evidence from six women who claimed to have been assaulted by Lelinski between 1997 and 1998. The trial court granted the motion.

¶8 The case was tried to a jury January 29, 2007 through February 3, 2007. At the conclusion of the trial, the jury convicted Lelinski on the three counts relating to Amanda and the one count relating to Josephine. Lelinski was acquitted on the counts relating to Myrtle. He was sentenced to twenty-seven years on the second-degree sexual assault, consisting of twenty-one years of initial confinement followed by six years of extended supervision. On the attempted second-degree sexual assault, he received a concurrent sentence of fifteen years, consisting of nine years of initial confinement, followed by six years of extended supervision. On the lewd and lascivious count, he received a concurrent nine-month jail sentence and on the fourth-degree sexual assault count, he received a consecutive nine-month jail sentence. He filed a postconviction motion, which was denied. He now appeals.

DISCUSSION

I. Sufficiency of the Evidence

¶9 Lelinski's first claim is that there was insufficient evidence to support the element of use or threat of force on the second-degree sexual assault of Amanda. The basis for this charge was Lelinski's hand to breast assault. Lelinski

argues that there was no evidence to support any use of force or threat of use of force for this particular act. We disagree.

¶10 In reviewing a challenge to the sufficiency of the evidence, we:

> may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If 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.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). In looking at the evidence under this test, we view it in a light most favorable to the conviction. *See* ***State v. Jensen***, 2000 WI 84, ¶23, 236 Wis. 2d 521, 613 N.W.2d 170. Under this standard of review, we conclude that the record is sufficient to uphold the conviction.

¶11 Second-degree sexual assault requires proof of three elements: (1) that the defendant had sexual contact with the victim; (2) that the victim did not consent to the contact; and (3) the defendant had sexual contact with the victim by use or threat of force or violence. *See* WIS. STAT. § 940.225(2)(a). Here, Lelinski challenges only the third element, arguing that the hand-to-breast assault did not have the use or threat of force preceding that act. Rather, he argues that the use of force or threat of force occurred *after* the hand-to-breast sexual contact.

¶12 The jury listened to Amanda's testimony of what happened. They were properly instructed as to what the State needed to prove to establish second-degree sexual assault. The guilty verdict rendered on this count means the jury felt the State had established use of force or threat of use of force on this

count. We conclude that, based on the evidence proffered, there is a possibility that a reasonable jury could draw appropriate inferences to find Lelinski guilty of second-degree sexual assault.

¶13 Here, Lelinski argues that no use or threat of force occurred before the hand-to-breast sexual assault. Lelinski, however, ignores the threat that can be inferred from Lelinski's previous encounters with Amanda and the context in which this assault occurred. In the days and hours preceding the assault, Lelinski had made repeated calls and visits to Amanda's home with a show of his police authority. During these contacts, he brought up the issue of her outstanding arrest warrant. She had clearly questioned why he continued to come to her home and told him she did not want him to do so. The assault at issue was immediately preceded by him arriving unannounced in the middle of the night and entering Amanda's home without permission. He asked her how much it cost for a private dance and would she dance for him. She declined and he reminded her of her outstanding warrant, pulled her down to the couch, and leaned over her. After he touched her through her clothing and under her clothing, he grabbed her by the hair and tried to force her mouth onto his penis.

¶14 From this evidence, it was reasonable for a jury to infer that the hand-to-breast assault occurred following a history of psychological intimidation, sufficient to constitute a use or threat of force. The use of force element need not be a separate and distinct act, but may be viewed "as a more generalized concept of conduct, including force threatened and force applied, directed toward compelling the victim's submission." ***State v. Baldwin***, 101 Wis. 2d 441, 451, 304 N.W.2d 742 (1981). The jury, here, was free to use the past history and the context to conclude that the third element of second-degree sexual assault had been satisfied. *See* ***State v. Jaworski***, 135 Wis. 2d 235, 239, 400 N.W.2d 29 (Ct.

App. 1986) ("The message conveyed by a threat is determined in part by the context in which it occurs."). A threat made days before an assault, may in some contexts, be construed to have lingered in the victim's mind and operate as use of force in subsequent contacts. *See* ***id.*** at 240.

¶15 Here, Lelinski established his position of authority over Amanda in the days preceding the assault. He used the fact that he was a police officer and the repeated threat of Amanda's outstanding warrant against her in order to force Amanda's submission for his own sexual gratification. His uninvited presence and entrance into her home in the middle of the night could be in and of itself the context of threat of force. The warrant threat was used again in an attempt to intimidate Amanda before the second-degree sexual assault occurred. Based on this evidence and the reasonable inferences arising therefrom, we reject Lelinski's claim that the evidence was insufficient to convict him of second-degree sexual assault. There was ample evidence in the record from which a reasonable jury could find Lelinski used or threatened the use of force or violence.

II. "Other Acts" Evidence

¶16 Lelinski's second contention is that the trial court erroneously exercised its discretion in allowing into evidence the testimony of four other women who claimed to have been assaulted by him as "other acts" evidence under WIS. STAT. § 904.04(2).

¶17 "We review a trial court's ruling on the admissibility of evidence for an erroneous exercise of discretion." ***State v. Ross***, 2003 WI App 27, ¶35, 260 Wis. 2d 291, 659 N.W.2d 122. An appellate court will not overturn a trial court's decision on an evidentiary ruling as long as the trial court examined the relevant facts, applied a proper standard of law and demonstrated a rational process in

reaching a reasonable conclusion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). In applying this deferential standard, this court cannot conclude that there was an erroneous exercise of discretion.

¶18 Admissibility of "other acts" evidence is governed by statute:

> [E]vidence 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, identify, or absence of mistake or accident.

WIS. STAT. § 904.04(2)(a). Thus, other acts evidence must first be offered for an acceptable purpose. *See* ***Sullivan***, 216 Wis. 2d at 772. It also must be relevant. ***Id.*** Finally, the probative value of the evidence must not be substantially outweighed by unfair prejudice. ***Id.*** at 772-73.

¶19 During the trial, the State offered the testimony of four women who testified as to their encounters with Lelinski in order to show that Lelinski had a plan or scheme to use his position of authority as a police officer to get sexual gratification. Kiwanna F. testified that Lelinski had responded to a request for police help from her upstairs neighbor in 1997. When he was questioning her alone, he commented on how big her breasts were. After the first encounter, he started coming over to her home unannounced about twice a week. On his first return, he wanted to see her breasts. When Kiwanna said no, he threatened her with arrest, and said he would interfere with her attempts to get a driver's license. Kiwanna testified that nothing else happened on that occasion because her kids were there, but the next time he came back, her kids were leaving for the weekend with their dad. Lelinski walked into her home, grabbed her, started kissing her and she resisted. He then got very aggressive, grabbed her breast hard and she

told him to stop. He was saying to her that "black women like it rough and she could handle it." Lelinski then told Kiwanna that he would have her arrested if she did not do what he wanted. Kiwanna submitted to his advances, and they had penis to vagina intercourse. When he left, he told her that she should not tell anyone because no one would believe her. These visits continued until 1999 when it eventually stopped.

¶20 Denise D.[3] testified that in 1997 while she was working as a prostitute, Lelinski approached her on the street in full uniform as she exited from a drug house. He was on foot patrol. He asked her for identification and she told him she had some in her apartment around the corner. He walked with her to get it. When they got to her door, she told him to wait a minute and went to grab the identification from her dresser. When she turned around, he had entered the room, closed the door and had his penis out of his pants and was masturbating. He called her a dirty black bitch. He masturbated on her carpet and left.

¶21 Shirley D. testified that in 1997 she was a prostitute and one night while waiting for a bus, Lelinski pulled up by her in his squad car and asked her for her name. He then told her she was wanted on a warrant, handcuffed her, put her in the squad and drove to a secluded area. He then got out of the car, opened the door to the back seat, had her swing her legs out so she was sitting in the back seat with her feet on the ground. He stood facing her and told her to "suck his dick." He told her that if she did not do what he wanted, he would take her downtown on her warrant. He grabbed her by the hair, forcing his penis into her

[3] Denise was sometimes referred to as Denise C. in the trial court. We use Denise D. in the text of this opinion.

mouth until he ejaculated. He called her names, including "bitch" and "black whore" and told her to catch and swallow all his "cum" or he would "cheek" her. He also grabbed her breast hard so that it hurt. Then he took off the handcuffs and let her go, warning her not to tell anyone.

¶22 Helen M. testified that in 1998 she called the police to report an armed robbery. Lelinski came to investigate the report with his partner. A short time later, while Helen was working her next shift at her place of employment, a Citgo gas station, Lelinski showed up indicating he had recovered her money. He then indicated he needed to speak to her regarding a warrant and they went into the storage room at the gas station. He indicated he needed to take her to the first district police station due to the warrant for her arrest. He handcuffed her and led her to his car, a black jeep truck. He put her in the back seat, drove to a secluded park and got into the back seat with her. He told her she was pretty and smelled good, then touched her breast and started kissing her. He had his gun on his belt and she was afraid to say much although she did tell him "no." He engaged in oral sex (mouth to vagina) and then had penis to vagina intercourse with her. He ejaculated and then drove her back to the Citgo. He told her not to tell anyone because he would find her and her family.

¶23 The trial court allowed the introduction of this "other acts" testimony on the basis that it was admissible for the purpose of proving "the defendant's plan or scheme that is related to his motive over time." The trial court found that the evidence was relevant to that purpose and not unfairly prejudicial. We conclude that the trial court did not erroneously exercise its discretion in allowing this evidence into the record. We agree that the evidence was relevant to Lelinski's intent over time to use his position as a police officer to get sexual gratification. Each victim was someone in need of police help or protection or

wanted by police on a warrant. We also agree that the evidence was not *unfairly* prejudicial. The evidence was not admitted, nor used, to demonstrate his bad character.

¶24 Lelinski argues that the "other acts" evidence does not support a plan under our holding in ***State v. DeKeyser***, 221 Wis. 2d 435, 585 N.W.2d 668 (Ct. App. 1998), *overruled on other grounds by* ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447. We do not agree. In ***DeKeyser***, the evidence of plan was one of previous sexual assault of a different fifteen-year-old granddaughter four years prior. *See* ***Id***. at 439. Here there are multiple acts of a similar nature over a long period of time. Both the factual scenario and legal presentation of the "other acts" issue distinguishes Lelinski's case from ***DeKeyser***.

¶25 Moreover, any prejudice arising from the introduction of this evidence was cured by the cautionary limiting instructions given by the trial court.[4] *See* ***State v. Anderson***, 230 Wis. 2d 121, 132-33, 600 N.W.2d 913 (Ct.

[4] The cautionary instruction provided:

> Evidence has been received regarding other crimes, wrongs or acts of the defendant for which the defendant is not on trial. Specifically evidence has been received that the defendant masturbated in the presence of Denise [D.] before sexual intercourse and or sexual contact on Shirley D[.], Kiwanna F[.] and Helen M[.].
>
> If you find that this conduct did occur[,] you should consider it only on the issues of the defendant's plan or scheme and his mo[d]us operandi. You may not consider this evidence to conclude the defendant has a certain character or certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case.

(continued)

App. 1999); *see also* ***State v. Shillcutt***, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983) ("If an admonitory instruction is properly given by the court, prejudice to a defendant is presumed erased from the jury's mind."), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984). Accordingly, we reject Lelinski's claim that the trial court erroneously exercised its discretion when it admitted the "other acts" evidence.

III. Joinder/Severance

¶26 Lelinski next asserts that the trial court erred when it granted the State's motion to join the offenses involving Amanda and Myrtle and the trial court erred when it denied Lelinski's motion to sever the joined offenses. Lelinski also claims the trial court erred in allowing the State to join the offense involving Josephine. We reject Lelinski's contentions.

¶27 Review of a challenged joinder "is a two-step process" on appeal. *See* ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). First, we independently examine the propriety of the initial determination of joinder as a matter of law. ***Id.*** "The joinder statute is to be construed broadly in favor of initial joinder." ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). Joinder may be obtained when two or more crimes "are of the same

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> The evidence was received on the issues of plan or scheme; that is, whether such conduct of the defendant was part of a design or scheme that le[]d to the commission of the offense charged and mo[d]us operandi; that is, the particular method of operating or doing things.
>
> You may consider this evidence only for the purpose I have described giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

or similar character or are based on the same act or transaction...." WIS. STAT. § 971.12(1). To be of the "'same or similar character,' crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988) (citation omitted). Second, whether joinder is improper due to prejudice to Lelinski is a factual question within the trial court's discretion. *See* ***State v. Nelson***, 146 Wis. 2d 442, 455, 432 N.W.2d 115 (Ct. App. 1988).

¶28 In reviewing decisions on severance, we will reverse the decision of the trial court only if it erroneously exercised its discretion. ***Locke***, 177 Wis. 2d at 597. A trial court properly exercised its discretion if it "contemplates a process of reasoning based on facts that are of record or that are reasonably derived by inference from the record," and renders "a conclusion based on a logical rationale founded upon proper legal standards." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶29 Thus, the first step is whether joinder of the offenses relating to Amanda, Myrtle and Josephine was proper. Here, we conclude that the trial court did not err in joining the offenses in this case. All of the charges were of the same or similar character: sexual assaults allegedly committed by Lelinski using his power as a police officer to compel the victim to comply. They all occurred over a relatively short period of time and the evidence was overlapping. We have already concluded that the trial court properly exercised its discretion in allowing the "other acts" evidence into the record. This evidence would have overlapped if the charges involving Amanda, Myrtle and Josephine had not been joined.

¶30 The second step is to determine whether the offenses specific to each of the three victims should have been severed due to substantial prejudice. *See*

Hoffman, 106 Wis. 2d at 209 (defendant seeking severance must show substantial prejudice will result if the counts are not severed). "[T]he trial court must balance any potential prejudice to the defendant against the public's interest in avoiding unnecessary or duplicative trials." ***Nelson***, 146 Wis. 2d at 455.

¶31 WISCONSIN STAT. § 971.12(3) provides in pertinent part:

> RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Here, Lelinski failed to show that joining the offenses together would cause him substantial prejudice. The verdict, itself, demonstrates that substantial prejudice did not occur. He argues that he was prejudiced because the sexual assaults were factually different and that conducting two separate trials would have prevented the jurors from hearing multiple victims testify against him. We are not convinced. The jury acquitted Lelinski on the counts relating to Myrtle, despite hearing Amanda and Josephine's testimony. This indicates that the jury was able to look at each offense separately, as it was instructed to do, and consider each offense independently. Lelinski's general assertions of prejudice are insufficient to outweigh the interests of the public to conduct a single trial with multiple counts rather than multiple trials. *See* ***State v. Bellows***, 218 Wis. 2d 614, 623-25, 582 N.W.2d 53 (Ct. App. 1998).

IV. Ineffective Assistance Claim/*Machner* Hearing

¶32 Lelinski's next argument is that the trial court erred when it summarily denied his claim asserting that his trial counsel provided ineffective assistance without conducting a ***Machner*** hearing. Specifically, he contends that

his trial counsel, although aware of the fact that Amanda had twice recently given false names to the police, declined to cross-examine on that basis. He argues that Amanda's lies to police would have been effective cross-examination in a case of credibility and could have affected the outcome. We are not convinced.

¶33 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶34 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are

clearly erroneous and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶35 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). In such cases, the trial court may, in the exercise of its legal discretion, deny the motion without a hearing. ***Id.*** To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310.

¶36 Based on our review of the record, we hold the trial court did not err when it summarily denied Lelinski's claim based on ineffective assistance of trial counsel. The record demonstrates that even if trial counsel would have asked Amanda about these instances, the outcome of the case would have been the same.

¶37 Lelinski refers to two instances where Amanda allegedly told police her name was Brandi Walls instead of giving her real name. These false representations were not at all related to Lelinski's case and did not involve Lelinski. Moreover, the jury deciding Lelinski's fate was fully aware of the allegations that Amanda gave police false names in the past because Amanda had

outstanding warrants and did not want to be arrested. Thus, Amanda's credibility was challenged on the basis Lelinski proffers in this appeal.

¶38 In addition, Lelinski's trial counsel made direct attacks on Amanda's credibility, questioning her about inconsistencies in her story and about statements she made to neighbors, which suggested that she was lying about the sexual assault to make money in a civil lawsuit against Lelinski. The impeachment and attack on her credibility was strong. Despite the attack, the jury believed her version of events and there is no possibility that additional cross-examination regarding her giving police a false name would have changed the outcome of this case. Accordingly, the record conclusively demonstrates that any failure by trial counsel to ask her about these incidents was not prejudicial and there was no need to conduct an evidentiary hearing on the claim.

V. Sentencing

¶39 Lelinski's last claim is that the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence. In support of his argument, Lelinski cites a number of other instances where police officers were sentenced to less time after being convicted in sexual assault cases. We are not persuaded.

¶40 In reviewing a sentencing challenge, we will affirm the trial court's decision if it properly exercised its discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). To do so, a sentencing court must consider three primary factors: "(1) the gravity and nature of the offense, including the effect on the victim, (2) the character and rehabilitative needs of the offender, and (3) the need to protect the public." ***Id.*** at 507. Lelinski does not argue that the trial court failed to consider the proper sentencing factors. He is wise not to make such an

assertion because the sentencing transcript demonstrates that the trial court considered all of the proper sentencing factors in reaching its determination in this case.

¶41 Lelinski contends, however, that the sentence imposed was unduly harsh because other police officers convicted of similar crimes were sentenced to less time.[5] In order to succeed on an unduly harsh sentencing assertion, Lelinski must show that the sentence imposed was "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." ***State v. Pratt***, 36 Wis. 2d 312, 322, 153 N.W.2d 18 (1967) (citation omitted); *see also* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶42 Here, the sentence imposed was substantially below the maximum potential sentence. Lelinski's conduct, which formed the basis for the charges, was shocking. He used his position as a police officer to prey upon victims who were poor and vulnerable. He used physical force, psychological intimidation and verbal abuse. He utilized his authority over Amanda and Josephine to isolate them, to use their position in society to degrade them. He committed the attempted sexual assault against Amanda in the presence of her young child. The infant's cries for her mother did not deter Lelinski from completing the assault or finishing the need to gratify himself sexually. The assault against Josephine was done *while on duty and in uniform*.

[5] We note that although Lelinski cites general sentencing principles and constitutional law about equal protection, these arguments are never developed and thus need not be addressed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶43 The sentence imposed by the trial court here was not unduly harsh. The trial court properly considered the facts specific to the cases before it in reaching a reasonable sentence to impose. On the felony counts alone, Lelinski faced a potential maximum of sixty years (thirty-seven and one-half years of initial confinement and twenty-two and one-half years' extended supervision). He received substantially less than the potential maximum. Based on the foregoing, we cannot conclude that the trial court erroneously exercised its sentencing discretion. The sentence imposed was based on the proper sentencing factors and was not unduly harsh.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.