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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

December 12, 2023

To:

Hon. Lindsey Canonie Grady
Circuit Court Judge
Electronic Notice

Daniel J. O'Brien
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Jeffrey Lemont Lee 400484
John C. Burke Correctional Center
P.O. Box 900
Waupun, WI 53963-0900

You are hereby notified that the Court has entered the following opinion and order:

2023AP26

State of Wisconsin v. Jeffrey Lemont Lee (L.C. # 2018CF5088)

Before White, C.J., Donald, P.J., and Geenen, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jeffrey Lemont Lee, *pro se*, appeals the order of the circuit court denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2021-22).¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Lee was convicted, after a jury trial, of aggravated battery, substantial battery, disorderly conduct with the use of a dangerous weapon, and felony bail jumping, all with domestic abuse

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

assessments and as a habitual offender. The charges were the result of an argument with his live-in girlfriend, B.S.R., which turned into a physical altercation. At the trial, held in February 2019, B.S.R. testified that she and Lee were arguing about money and their relationship when Lee hit her in the face. She said he then continued to hit her numerous times in the head with a closed fist, and that he pulled out a knife at one point during the altercation. B.S.R.'s injuries included internal bleeding on the top of her head, a nasal fracture, and broken veins in her forehead. After the assault, she was transported to the hospital and admitted into the intensive care unit; overall, she spent nine days in the hospital.

Lee testified at trial in his own defense. He stated that B.S.R. started the fight by hitting him in the head with an iron pot. He also said that she threw a vase at him, which shattered, and that she cut his chest with a piece of the broken vase. He claimed to have lost a lot of blood and “blacked out” as a result, and therefore did not know how B.S.R. had sustained her injuries.

Lee sought to have a self defense instruction given to the jury, but the circuit court denied that request. The court concluded that based on Lee's testimony that he had blacked out and had no memory of his actions toward B.S.R., the self defense instruction was not warranted because there was no evidence upon which to make a determination as to whether Lee's actions were defensive.

After his conviction, Lee filed a postconviction motion in September 2020. He argued that since he had no memory of the events, it was a due process violation to prosecute him. Lee asserted that he had amnesia from the incident, and that had prevented him from providing testimony that would be sufficient to support a self defense instruction. The circuit court rejected

that argument, observing that Lee had provided no evidence that he had amnesia, other than his own testimony at trial.

Lee also argued in his postconviction motion that his trial counsel was ineffective for failing to preserve evidence of the severity of his chest wound by taking a photograph of it shortly after he was arrested. Instead, a photo of the wound that was taken approximately three months after the incident, when it was already healed, was introduced into evidence at the trial.

The circuit court rejected that argument as well, due to Lee's failure to establish that he had been prejudiced by this alleged error. The court observed that Lee's friend who had treated his wound shortly after the incident had provided testimony regarding its appearance. Furthermore, the court noted that Lee had downplayed the severity of the wound when he was cross-examined, in that he stated that he did not go to the hospital for treatment or get stitches to close the wound.

Additionally, the circuit court stated that "the issue at trial was not the severity of [Lee]'s cut *per se* but the credibility of the witnesses." The court opined that B.S.R. had testified "very credibly" that Lee was the aggressor during the incident. Therefore, the court denied Lee's postconviction motion without a hearing.

Lee appealed that decision, and this court affirmed. *See State v. Lee*, No. 2020AP1597-CR, unpublished slip op. (WI App June 29, 2021). Lee filed a petition for review of the decision with our supreme court, which was denied.

Lee subsequently filed the WIS. STAT. § 974.06 motion underlying this appeal in August 2022. In his motion, Lee raises three claims of ineffective assistance of trial counsel:

(1) that his trial counsel should have argued that the circuit court’s failure to give the self defense jury instruction was a constitutional violation; (2) that counsel should have investigated and presented a defense of not guilty by reason of mental disease or defect (NGI) with regard to his alleged amnesia; and (3) that counsel failed to cross-examine the police witnesses more thoroughly regarding their failure to test the blood at the scene, to determine whether it was actually his blood as opposed to B.S.R.’s blood, which he believes would have bolstered his claim that B.S.R. was the aggressor. Lee also raises a claim of ineffective assistance of his postconviction counsel for failing to raise these claims in his direct appeal. The circuit court denied the motion without a hearing, concluding that Lee’s claims are procedurally barred, as well as failing on the merits. We agree.

Once the right to a direct appeal has been exhausted, WIS. STAT. § 974.06 is the mechanism for a defendant to bring constitutional claims. *State v. Henley*, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. An ineffective assistance of counsel claim is a constitutional issue that may be properly brought under a § 974.06 motion. *State v. Balliette*, 2011 WI 79, ¶34, 336 Wis. 2d 358, 805 N.W.2d 334. However, issues that were already litigated “may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Lee’s first two claims relating to the self defense jury instruction and his alleged amnesia, although presented here as claims of ineffective assistance of counsel, have already been fully litigated. This court previously affirmed the circuit court’s discretionary decision not to provide the self defense jury instruction. *See Lee*, No. 2020AP1597-CR, ¶22. We also rejected Lee’s claim of amnesia for a lack of evidence, *see id.*, ¶28, and we discern no evidence in the record

that would support an NGI claim based on that purported amnesia. These claims are therefore procedurally barred. *See Witkowski*, 163 Wis. 2d at 990.

Lee’s third claim—that his trial counsel was ineffective in questioning the officers regarding the absence of blood testing at the scene and, relatedly, that trial counsel should have objected to the admission of crime scene photographs, which depicted a large amount of blood—was not previously raised in his direct appeal. However, a defendant is precluded from raising any claim in a WIS. STAT. § 974.06 motion—including an ineffective assistance claim—if that claim could have been brought on direct appeal, *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 173, 517 N.W.2d 157 (1994), unless he or she can demonstrate that the claim is “clearly stronger” than the claims postconviction counsel previously brought, *State v. Romero-Georgana*, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668. This is determined by “compar[ing] the arguments now proposed against the arguments previously made.” *Id.*, ¶46. If the defendant cannot establish that a claim brought under § 974.06 is clearly stronger, then the claim is procedurally barred. *Romero-Georgana*, 360 Wis. 2d 522, ¶5. “Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law” that we review *de novo*. *Romero-Georgana*, 360 Wis. 2d 522, ¶30.

Lee has not sufficiently pled that his third claim is clearly stronger than the claims that were brought in his direct appeal. Rather, he makes only conclusory statements regarding the clearly-stronger test, without providing any meaningful comparison analysis demonstrating why this claim is clearly stronger than the claims previously raised in his direct appeal. *See id.*, ¶46.

Furthermore, Lee fails to demonstrate that his trial counsel was ineffective. To prove ineffective assistance of counsel, a defendant must show both that counsel’s performance was

deficient and that the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant “must prevail on both parts of the test to be afforded relief.” *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

Additionally, a claim of ineffective assistance of counsel requires that a postconviction evidentiary hearing be held “to preserve the testimony of trial counsel.” *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a defendant is not automatically entitled to an evidentiary hearing relating to his or her postconviction motion. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If sufficient facts are alleged in the motion, the circuit court must hold an evidentiary hearing. *Romero-Georgana*, 360 Wis. 2d 522, ¶30. Whether a WIS. STAT. § 974.06 alleges sufficient facts to require a hearing is a question of law that we review *de novo*. *Romero-Georgana*, 360 Wis. 2d 522, ¶30.

However, if the WIS. STAT. § 974.06 motion “does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Romero-Georgana*, 360 Wis. 2d 522, ¶30 (citation omitted). This court reviews that discretionary decision under the erroneous exercise of discretion standard. *Id.*

In order for an evidentiary hearing to be warranted, an ineffective assistance of counsel claim set forth in a WIS. STAT. § 974.06 motion must be pled with “particularity” to provide a “clearly articulated justification” for holding a hearing. *Balliette*, 336 Wis. 2d 358, ¶¶40, 58. Indeed, the motion must “make the case” for an ineffective assistance of counsel claim in order to be deemed sufficiently pled. *Id.*, ¶67.

Lee’s pleadings do not establish an ineffective assistance of counsel claim, particularly with regard to the prejudice prong of *Strickland*. See *id.*, 466 U.S. at 697 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”). 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.” *Id.* at 694. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.*

In his motion, Lee makes only conclusory statements regarding the alleged deficiencies of his trial counsel with regard to this claim, and their prejudicial effect on his defense. To the contrary, as the circuit court pointed out in its decision, Lee’s trial counsel did in fact elicit testimony from one of the police officers during cross-examination that no testing of the blood at the scene had been done, which the jury was then able to consider.

Furthermore, B.S.R. testified—very credibly, according to the circuit court and, presumably, the jury—that the blood depicted in the crime scene photographs was hers. Additionally, the State presented evidence of the extent of B.S.R.’s injuries through her testimony as well as her medical records. Based on the veracity of this evidence, there is not a reasonable probability that additional testimony relating to a lack of blood testing at the scene would have altered the outcome of the trial. See *id.*

Lee’s related argument, that his trial counsel should have objected to the admission of the crime scene photographs because they were presented solely for their “shock value” to “inflame the jury and create sympathy” for B.S.R., is also not compelling. As the State explained, its purpose for admitting the photographs was to assist in proving the elements of substantial battery

and aggravated battery as they related to the extent of B.S.R.'s injuries. *See* WIS JI—CRIMINAL 1222, 1224.

The decision to admit photographs into evidence “is a matter within the [circuit] court’s discretion.” *State v. Pfaff*, 2004 WI App 31, ¶34, 269 Wis. 2d 786, 676 N.W.2d 562. The circuit court recognized the State’s proffer of the photographs as a “legitimate purpose” in its decision on Lee’s WIS. STAT. § 974.06 motion, stating that the photographs would have been “properly admitted into evidence regardless of whether or not trial counsel had raised an objection.” Based on the record, that determination was reasonable. *See Pfaff*, 269 Wis. 2d 786, ¶34, (stating that this court “will not disturb the [circuit] court’s discretionary decision ‘unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury’” (citation omitted)).

Therefore, the admission of the photographs was not an erroneous exercise of the circuit court’s discretion. *See id.* As a result, Lee has not demonstrated that his trial counsel was ineffective, because counsel cannot be deemed to be ineffective for failing to make a “pointless objection.” *State v. Cameron*, 2016 WI App 54, ¶27, 370 Wis. 2d 661, 885 N.W.2d 611.

In short, Lee’s third claim of ineffective assistance of trial counsel fails. As a result, he has also not proven his claim of ineffective assistance of postconviction counsel, as such a claim requires demonstrating that trial counsel was actually ineffective. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Accordingly, as Lee has presented no viable claims in his WIS. STAT. § 974.06 motion, the circuit court did not err in denying the motion without a hearing. *See Romero-Georgana*, 360 Wis. 2d 522, ¶71. We therefore affirm.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals