COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 1996

No. 94-2288

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HARRISON M. MARCUM,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Harrison M. Marcum appeals pro se from a trial court order denying his § 974.06, STATS., postconviction motion on the grounds that the issues raised therein were barred under ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994). With the exception of evidence which Marcum claims was newly discovered and with regard to which trial counsel was ineffective, we agree with the circuit court that all of Marcum's § 974.06 issues are barred because they should have been or were previously litigated. We further hold that even if the evidence was newly discovered, trial counsel

was not ineffective for failing to obtain it and use it at trial. Accordingly, we affirm.

Pursuant to ***Escalona-Naranjo,*** an issue which could have been raised in a postconviction motion under § 974.02, STATS., and on direct appeal may not be raised in a motion under § 974.06, STATS., unless the trial court ascertains that a sufficient reason exists for the defendant's failure to allege or adequately raise the issue in his or her original motion. ***Escalona-Naranjo,*** 185 Wis.2d at 181-82, 517 N.W.2d at 162. Similarly, a defendant is barred from raising anew issues which have already been determined on appeal. *See* § 974.06, STATS.; *see also* ***State v. Witkowski,*** 163 Wis.2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991).

Marcum was convicted in May 1990 of two counts of first-degree sexual assault of Christina O. (count one and count six). On direct appeal, ***State v. Marcum,*** 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992), Marcum argued that: (1) he was deprived of his constitutional right to a unanimous verdict on count six; (2) trial counsel was ineffective; (3) and he should receive a new trial in the interest of justice. In January 1992, this court reversed Marcum's conviction on count six on the grounds that trial counsel was ineffective for failing to object to the final verdict form. The court affirmed the conviction on count one.

In May 1994, Marcum filed a § 974.06, STATS., motion pro se seeking a new trial based on prosecutorial misconduct, newly discovered evidence and challenges to the sufficiency of the evidence, the constitutionality of the rape shield law, evidentiary rulings and trial counsel's assistance. At the hearing on the motion, the State argued that the issues raised by Marcum were barred under ***Escalona-Naranjo***. Marcum argued that he had a sufficient reason for not pursuing the newly discovered evidence and ineffective assistance of trial counsel claims because it was only after his appeal concluded in 1992 that the evidence came to his attention. The trial court found that all of Marcum's claims were barred under ***Escalona-Naranjo***.

As to all issues other than the newly discovered evidence and associated ineffective assistance of trial counsel claims, we agree with the trial court that Marcum's claims were barred under either ***Escalona-Naranjo*** (i.e.,

rape shield challenge, evidentiary rulings and prosecutorial misconduct) or ***Witkowski*** (i.e., sufficiency of the evidence).

However, this court will address Marcum's newly discovered evidence claim and related ineffective assistance of trial counsel claim on the merits. At the hearing on the § 974.06, STATS., motion, Marcum stated that he did not obtain the document which he contends to be newly discovered evidence until after his direct appeal concluded. Under the facts of this case, we conclude that Marcum demonstrated a sufficient reason for not having raised his newly discovered evidence and ineffective assistance of trial counsel claims as part of his direct appeal. Accordingly, we turn to the merits of those claims.[1]

Marcum's newly discovered evidence is a social services intake narrative referring to a September 1987 referral. The document states that the victim in this case, Christina, may have been physically and sexually abused by Marcum prior to the incidents which were the subject of Marcum's trial. The possible abuse was reported by Haley N., Christina's friend. Marcum's wife obtained the narrative from the social services file after Marcum's direct appeal was concluded.

Assuming arguendo that the 1987 social services narrative constitutes newly discovered evidence, *see* ***State v. Boyce,*** 75 Wis.2d 452, 457, 249 N.W.2d 758, 760-61 (1977), we conclude that Marcum has not demonstrated that trial counsel's failure to investigate, locate and use this evidence at trial to impeach a witness was ineffective assistance.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the

[1] Even if Marcum did not demonstrate a sufficient reason, waiver is a rule of judicial administration. *See* ***Waukesha County v. Pewaukee Marina, Inc.,*** 187 Wis.2d 18, 22, 522 N.W.2d 536, 538 (Ct. App. 1994). We may choose to decide an issue which is otherwise waived when the parties have briefed the issue and there are no disputed issues of fact. *See* ***Wirth v. Ehly,*** 93 Wis.2d 433, 444, 287 N.W.2d 140, 146 (1980). Here, there is no dispute in the record that Marcum first obtained the document he contends is newly discovered evidence after this court released its decision in his direct appeal.

defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.***

We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). 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. ***State v. Johnson,*** 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49. The final determination of whether counsel's performance prejudiced the defense is a question of law which this court decides independently. ***State v. Knight***, 168 Wis.2d 509, 514 n. 2, 484 N.W.2d 540, 541 (1992).

At trial, Haley testified that she slept over at Christina's house one evening in the summer of 1988 and observed Marcum have sexual contact with Christina. There was no mention at trial of the social services narrative. In affirming Marcum's conviction on count one, we noted that there was a witness who corroborated allegations that Marcum sexually assaulted Christina in August 1988. *See* ***Marcum,*** 166 Wis.2d at 928, 480 N.W.2d at 555.

Marcum contends that the narrative should have been used to impeach Haley at trial because it indicates a prior false accusation by her with regard to physical and sexual abuse of Christina. Marcum contends that the accusation was false because the social worker found no marks or injuries on Christina and could not substantiate the physical abuse allegations. Marcum alleges that trial counsel was ineffective for not having discovered the social services narrative and investigating and determining whether it impacted on Haley's credibility.

It does not follow that the absence of physical evidence of abuse means that Haley falsely accused Marcum in September 1987 or that her testimony regarding the August 1988 sexual abuse is impeached by the

September 1987 social services intake narrative. Marcum has not shown that there is a reasonable probability that had counsel discovered the social services narrative and confronted Haley with it or otherwise used it to impeach her,[2] it is reasonably probable that Marcum would have been acquitted of count one.[3]

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[2] We do not address whether evidence relating to the narrative would have been admissible for any purpose at trial. Rather, we assume that it would have been and discern no prejudice from trial counsel's failure to locate and use the evidence.

[3] Any issue not specifically addressed by this opinion is deemed rejected. ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1977), *cert. denied,* 439 U.S. 865 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.")