OFFICE OF THE CLERK
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 II

July 16, 2014

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Kenosha County Courthouse
912 56th St
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Michael C. Sanders
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Robert D. Zapf
District Attorney
Molinaro Bldg
912 56th Street
Kenosha, WI 53140-3747

Maurice Barnes 564983
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2013AP118-CR State of Wisconsin v. Maurice Barnes (L.C. #2009CF702)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Maurice Barnes appeals from a judgment of conviction and an order denying his motion for postconviction relief. Barnes argues that the trial court improperly reinstructed the jury and that trial counsel was ineffective. 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 (2011-12).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Barnes was charged with two counts of second-degree sexual assault, false imprisonment, strangulation/suffocation, and obstructing an officer. At trial, Barnes and the victim, M.D.O., both testified that while walking to the home of Barnes's relative, they ended up in a cornfield. They offered different stories about what happened in the cornfield. M.D.O. testified that Barnes pushed her down, ripped off her clothes, and forced her to have intercourse. Barnes testified that M.D.O. took off her own clothes, asked Barnes to have sex, and that he declined. Both agreed that prior to leaving the cornfield, Barnes gave M.D.O. his boxer shorts because they were unable to locate her clothing. Both testified that they left the cornfield and walked down the street with M.D.O. clad in Barnes's underwear. M.D.O. testified that Barnes held on to her arm so that she would not run away. Both agreed that they entered an open van and engaged in intercourse. Barnes testified that the intercourse was at M.D.O.'s suggestion, and M.D.O. testified that it occurred without her consent.

Both parties testified that they exited the van and walked down the street. M.D.O. testified that Barnes let go of her arm after she promised not to call the police, and that she ran into a nearby gas station and asked the clerk to call the police. Barnes testified that M.D.O. went into the gas station looking for beer while he headed to another store about a block away to use the pay phone.

The gas station clerk testified that M.D.O. came inside, said she had been raped, and asked the clerk to call the police. According to the clerk, M.D.O. was crying and had bruises all over and blood running out of her mouth. Officer Ron Lucci testified that he responded to the call and that M.D.O. was shaking and crying and had bruises and dried dirt on her body. Officers testified that Barnes was soon apprehended and provided a false name and birthdate.

A nurse testified that she examined M.D.O. and observed "scratches and bruises on her chin, arms, chest, legs, thigh, inner thigh and hands" as well as vaginal injuries that were consistent with forced or rough sex. Officers testified that they searched the cornfield and found M.D.O.'s clothing and Barnes's driver's license.

During deliberations, the jury twice asked to examine the clothing and photographs that were in evidence. Both times, pursuant to trial counsel's objection, the trial court refused to allow the evidence into the jury room. The jury also posed a series of questions.[2] After consulting with the parties and pursuant to their agreement, the trial court referred the jury back to the written jury instructions. The jury found Barnes guilty of the two sexual assault charges and false imprisonment, and not guilty of strangulation/suffocation.[3] Barnes filed a pro se[4] postconviction motion, and following an evidentiary hearing, the trial court determined that trial counsel had not performed deficiently and denied Barnes's motion.

We reject Barnes's claim that the trial court erred by declining to send the physical evidence to the jury room or provide additional instruction in response to the jury's questions. The court's response was fully consistent with trial counsel's position and any claim of error is

[2] The jury asked: (1) "what is to be included in evidence, specifically the role of the testimony of [MDO] and Mr. Barnes"; (2) "the definition of circumstantial evidence and its role in the jury's decision process"; (3) "the jury's role in evaluating the evidence"; (4) "the definition and explanation of reasonable doubt"; (5) "which statements were stricken from the record"; and (6) "what does the law say about a sex act turning from consensual to nonconsensual sex after the penis has been inserted in the vagina? What is the difference between sexual assault and rape as it pertains to the charges?"

[3] Barnes pled guilty to obstructing an officer.

[4] Barnes was originally represented by and later discharged appointed counsel.

forfeited.[5] Additionally, the packet of written instructions sufficiently answered the jury's questions and the trial court properly exercised its discretion by referring the jury back to the provided pattern instructions. *See* ***State v. Hubbard***, 2008 WI 92, ¶29, 313 Wis. 2d 1, 752 N.W.2d 839 (when a jury requests clarification during deliberations, the trial court has broad discretion in determining the necessity, extent and form of reinstruction).

We also conclude that trial counsel did not perform deficiently and reject Barnes's ineffective assistance of counsel claims.[6] As to the claim that counsel should have filed a motion seeking access to the victim's mental health records, trial counsel testified that he chose to "attack her credibility based on her intoxication at the time versus any mental health issues." We agree with the trial court that in light of this strategy, "[t]here was no need to request the mental health records" because "that was not the theory of the defense." *See* ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583 (the reasonableness of an attorney's acts must be viewed from counsel's contemporary perspective to eliminate the distortion of hindsight). Additionally, Barnes has failed to make a preliminary showing that M.D.O.'s privileged records were material to his defense. *See* ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298; *see also* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126 ("[A] defendant who alleges a failure to investigate on the part of his or her counsel must

[5] Barnes does not allege that trial counsel was ineffective for agreeing that the physical evidence should not be provided to the jury or by failing to object to the court's form of reinstruction.

[6] The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

allege with specificity what the investigation would have revealed ….”). Trial counsel made a reasonable strategic decision to attack M.D.O.’s ability to perceive, remember and recount that evening’s events based on the ample evidence of her intoxication and was neither obligated nor entitled to embark on the fishing expedition Barnes now advocates.

We also conclude that trial counsel did not perform deficiently by failing to retain an expert to testify about the victim’s and Barnes’s injuries. Trial counsel introduced evidence that the victim’s injuries pre-existed the assault. Barnes asserts that an expert would have testified that the injury evidence was inconsistent with a sexual assault. This is pure speculation. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). It also ignores the gas station clerk’s testimony that M.D.O. ran into the store with blood running out of her mouth, and Officer Viola’s testimony that shortly after the attack, Barnes had “vertical scratch marks down the middle of his back.”

Next, we conclude that it was not deficient for trial counsel to decline to exploit M.D.O.’s failure to “indicate[] that she was so intimidated that she was afraid or unable to resist.” As recognized in ***State v. Herfel***, 49 Wis. 2d 513, 518-19, 182 N.W.2d 232 (1971), a victim’s lack of resistance does not equate with consent. The trial court correctly determined that “[t]here is no requirement that a rape victim resist.… That’s not an element of sexual assault so none of that is relevant.” *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (trial counsel not deficient for failing to make a meritless argument).

Finally,[7] we reject Barnes's unexplained and undeveloped argument that trial counsel performed deficiently by failing to point out inconsistencies concerning M.D.O.'s description of her clothing and the details of where these items were discovered by the police. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Barnes fails to explain how any alleged inconsistencies are marginally relevant to the disputed issue of whether M.D.O. consented to intercourse with Barnes.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[7] To the extent that any of Barnes's arguments are not explicitly addressed, we have concluded that Barnes failed to establish deficient performance. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").