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March 15, 2016

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

2013AP988-CR State of Wisconsin v. Dennis E. Pearson (L.C. # 2005CF148)

Before Higginbotham, Sherman and Blanchard, JJ.

Dennis Pearson appeals from orders denying motions that sought a new trial and a modification of his judgment of conviction. 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 (2013-14). We affirm the orders.

Pearson was convicted of two counts of repeated sexual assault of a child under the age of 16, and one count of second-degree sexual assault of a child under the age of 16. He filed a

postconviction motion seeking a new trial and seeking to vacate his second-degree sexual assault conviction on the basis that the charge violated WIS. STAT. 948.025(3),[1] which prohibits overlapping sexual assault charges involving the same child and the same time period. The State conceded the violation. The circuit court vacated the conviction and sentence on the second-degree sexual assault charge, and in all other respects denied the motion. The conviction, as modified, was affirmed on appeal. Pearson filed subsequent motions,[2] which sought another modification of the judgment of conviction and a new trial based on ineffective assistance of trial counsel and alleged ***Brady***[3] violations. The circuit court denied the motions, and Pearson now appeals.

Ineffective Assistance of Trial Counsel

Because Pearson's motion for a new trial based on alleged ineffective assistance of trial counsel could have been raised in his first postconviction motion, Pearson must show sufficient reason that these grounds for relief were not previously asserted or they are deemed barred. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may constitute a sufficient reason. *See* ***State v. Balliette***, 2011 WI 79, ¶37, 336 Wis. 2d 358, 805 N.W.2d 334. A circuit court engages in fact-finding to

[1] All remaining references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] This court sua sponte stayed an appeal of an order that disposed of some of Pearson's motions pending a ruling by the circuit court on his remaining motions. After an evidentiary hearing on Pearson's claim of ineffective assistance of postconviction counsel, the circuit court denied Pearson's remaining motions. We construed Pearson's subsequent notice of appeal as "an additional notice of appeal within his existing appeal." This appeal thus consists of a review of the two orders denying Pearson's second and subsequent postconviction motions.

[3] ***Brady v. Maryland,*** 373 U.S. 83 (1963).

rule on the sufficiency of the reason. ***Id.*** When a circuit court's factual determinations are rooted in its assessment of the witnesses' credibility, we accept those determinations. ***State v. Quarzenski***, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844. "[A] motion for a new trial under [WIS. STAT.] § 974.06 based on ineffective assistance of postconviction counsel must lay out the traditional elements of deficient performance and prejudice to the defense." ***Balliette***, 336 Wis. 2d 358, ¶28. "[P]rejudice analysis is necessarily fact-dependent. Whether counsel's deficient performance satisfies the prejudice prong of ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)] depends upon the totality of the circumstances at trial." ***State v. Jenkins***, 2014 WI 59, ¶50, 355 Wis. 2d 180, 848 N.W.2d 786.

Pearson argued that ineffective assistance of postconviction counsel was the reason his claims should not be deemed barred under ***Escalona***. The circuit court held an evidentiary hearing at which postconviction counsel testified. At the hearing Pearson questioned postconviction counsel, and counsel explained why he had proceeded as he had and disagreed with the legal assumptions that underlay Pearson's arguments. Postconviction counsel testified that he had not raised the issues about which Pearson was inquiring because on those points he could not show prejudice to Pearson, even if trial counsel's performance had been deficient. The circuit court found that Pearson failed to show that the alleged deficient performance of postconviction counsel resulted in prejudice to Pearson because the issues Pearson alleged postconviction counsel should have raised would not have resulted in a different outcome. The circuit court concluded that there was no "proof other than the defendant's bald assertions" that Pearson was prejudiced by postconviction counsel's failure to make the arguments. The circuit court noted that, as to each claimed error, Pearson had offered nothing that would compel a different outcome in the case or undermine the credibility of the victims' testimony. The circuit

court denied Pearson's motion on the ground that he had not met his burden of showing that postconviction counsel's performance had prejudiced him.

In the context of a ***Strickland*** analysis, a prejudice determination is made in the context of all the evidence presented. *See* ***id.*** Pearson seemingly fails to appreciate the fact that witness testimony that a jury considered credible is part of the totality of the circumstances of his trial. The jury heard the victims' testimony, and the testimony of a doctor who had examined the victims and who testified that what he observed was consistent with the girls' accounts of repeated intercourse over a period of years. Under the totality of the circumstances, there is no basis to conclude that the errors Pearson asserts trial counsel committed prejudiced him. Absent a showing of prejudice, there is no basis for concluding that postconviction counsel was ineffective. *See* ***Strickland,*** 466 U.S. at 687. Absent a conclusion that postconviction counsel was ineffective, Pearson has not succeeded in showing a sufficient reason that the motions should be reviewed, and we reject his claims of ineffective assistance of trial counsel on this basis. *See* ***Escalona***, 185 Wis. 2d at 185.

Alleged Brady Violations

Pearson's subsequent postconviction motions also sought a new trial on the basis of potentially exculpatory evidence that he contends the State withheld in violation of its obligations under ***Brady v. Maryland***, 373 U.S. 83 (1963). He argued that the State improperly failed to disclose evidence regarding counseling that the victims received, evidence that he argued could have been used to undermine their credibility as witnesses. He also argued that the State improperly failed to disclose a receipt showing that two items--a yellow gourd and a small black rubber cylinder--were gathered into evidence and initially identified by police as

"unknown sex objects." Pearson obtained the receipt after trial through a public records request, and asserts that it was not in his trial counsel's file. Pearson argued that this receipt should have been disclosed so that these items could be submitted for DNA testing that could have exonerated him.[4]

Brady holds that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Id.*** at 87. To establish a ***Brady*** violation, a defendant must show that the State suppressed evidence favorable to the defendant and material to the determination of guilt. ***State v. Harris***, 2004 WI 64, ¶¶12–13, 272 Wis. 2d 80, 680 N.W.2d 737. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***United States v. Bagley***, 473 U.S. 667, 682 (1985). "***Brady*** requires production of information which is within the exclusive possession of state authorities. Exclusive control will not be presumed where the witness is available to the defense and the record fails to disclose an excuse for the defense's failure to question him." ***State v. Sarinske***, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979).

[4] The State's brief argued that Pearson's motions were barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and it did not otherwise address the issues raised under ***Brady*** and WIS. STAT. § 948.025(3). These two issues could not be barred under ***Escalona*** because they are based on allegations regarding events post-dating the direct appeal. Pearson argues that the State's failure to refute his arguments on these issues constitutes forfeiture. Forfeiture is a rule of judicial administration, and a reviewing court has the inherent authority to disregard a forfeiture and address the merits of an unpreserved argument. ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶3, 273 Wis. 2d 76, 681 N.W.2d 190. We do so here.

The circuit court described Pearson's arguments as "speculative at best" and found that "any failure to provide the list which identified the two objects was not material and would not have [a]ffected the outcome of the trial."[5] It likewise found that "even if evidence as to treatment were disclosed, there is not a reasonable probability that the outcome of the trial would have been different."

Pearson contends that the evidence in question was favorable to him, and the failure to disclose it to the defense was sufficient to undermine confidence in the outcome of the case. His theory is that the disclosure to the defense of the list showing the items taken into evidence might have resulted in the defense asking whether the items were taken from the girls' bedroom and pursuing a theory that the items had been used by the girls as sex toys, which, he reasons, would have provided an alternate explanation for the appearance of extensive sexual experience observed by the examining doctor. We note that the jury heard extensive testimony from the doctor on the question of alternative explanations. Defense counsel questioned the doctor on the possibility that the girls could have caused the conditions he observed by the use of sex toys, and the doctor answered that they could have. On redirect, the doctor was asked, "If a child under 12 would have used a sex toy to initially break her hymen, would that have caused a great deal of pain?" He answered that it would and that it would be "very difficult" to do so. Defense counsel also questioned the doctor regarding his testimony that the appearance of the girls' vaginas was consistent with having had sex "over 50 times," and the doctor responded that he could not tell from such an exam "[a]n exact number" but that there is a difference "between a sexually

[5] The circuit court assumed for purposes of deciding the motion that the evidence receipt was not disclosed to the defense.

immature and a sexually matured introitus." He testified that the 12-year-old had a "sexually matured vagina" and that he had "never seen that in a 12[-]year[-]old child." The doctor testified that he had examined "[h]undreds" of 12-year-old girls in his 21-year career. The lack of the list, even if it is material, did not deprive trial counsel of the opportunity to successfully cross-examine the doctor about alternative explanations, and when this topic is viewed in light of the evidence as a whole, there is not a reasonable probability that had the State disclosed the list, the result would have been different.

Pearson also claims a ***Brady*** violation with respect to counseling records of the victims. Pearson does not claim that the counseling records or the knowledge that they existed were in the exclusive control of the State, which is a prerequisite for a ***Brady*** violation. *See* ***Sarinske***, 91 Wis. 2d at 36. He has failed to show that a ***Brady*** violation occurred with respect to the counseling records.

WIS. STAT. § 948.025(3) Violation

Finally, Pearson argues that postconviction counsel was ineffective because counsel sought the wrong remedy for a violation of WIS. STAT. § 948.025(3). Postconviction counsel had argued, and the State conceded in its response, that the second-degree sexual assault charge was improper under § 948.025(3) because the defendant was charged in separate counts with sexual assault and repeated sexual assault of the same child in the same time period. The circuit court vacated the conviction and sentence on that count and amended the judgment of conviction accordingly.

Pearson contends that postconviction counsel was ineffective for failing to argue that Pearson was entitled to have the court vacate the repeated sexual assault charge rather than the

second-degree sexual assault charge. He cites ***State v. Cooper***, 2003 WI App 227, 267 Wis. 2d 886, 672 N.W.2d 118, wherein this court affirmed the circuit court's ruling, upon a finding of a WIS. STAT. § 948.025(3) violation, vacating a single count of repeated sexual assault rather than the three counts of first-degree sexual assault. ***Cooper*** holds that the circuit court may vacate the repeated assault charge in the event of a violation, not that it must. In fact, we merely noted that "the State should choose which charge or charges it will pursue." ***Id.,*** ¶15. There is no basis in published case law to hold that the court must give a windfall to the defendant by vacating a specific charge or charges where there is a § 948.025(3) violation. Furthermore, in the cases on which we relied in ***Cooper***, defendants were, like Pearson, seeking to evade greater penalties, and the rationale for rejecting their arguments was that the statute criminalizing continuous sexual abuse of a child should not "'be used by … molesters to circumvent … more severe penalties.'" ***Id.***, ¶11 (quoting ***People v. Alvarez***, 122 Cal. Rptr. 2d 859, 863-64 (2002)). Therefore, there is no basis for claiming deficient performance on the part of postconviction counsel as to this argument. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996) (failure to raise an issue of law is not deficient performance if the legal issue is without merit).

Upon the foregoing reasons,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals