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

2015AP752-CR State of Wisconsin v. Paul A. Turner (L.C. #2013CF710)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Paul A. Turner appeals from a judgment of conviction and an order denying his postconviction motion. He contends that (1) the circuit court erred in instructing the jury on a lesser-included offense; (2) there was insufficient evidence to support his conviction; (3) his postconviction counsel was ineffective; and (4) he was entitled to an evidentiary hearing on his postconviction claims. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).[1] We affirm the judgment and order of the circuit court.

In 2013, Turner was charged with two counts of second-degree sexual assault and one count of false imprisonment. The charges stemmed from allegations that Turner had assaulted a woman named F.M.C. after she fell asleep on a couch. According to F.M.C., she awoke to find Turner performing oral sex on her and demanded that he stop. Turner subsequently pinned her down and forced his penis into her vagina as she continued to yell, "No!"

At trial, F.M.C. repeated her allegations against Turner. Turner, meanwhile, maintained that his sexual acts with F.M.C. were consensual. After the close of evidence, the circuit court held a verdict conference and addressed the State's proposed verdict forms. Both Turner and his attorney stipulated that third-degree sexual assault should be submitted to the jury as a lesser-included offense of second-degree sexual assault, as charged in Count 3, which concerned the alleged penis to vagina intercourse. That exchange was as follows:

> THE COURT: … [The State] submitted proposed verdict forms. It suggests we need a lesser included. Any stipulation as to a lesser included, third degree sexual assault, [defense counsel]?
>
> [DEFENSE COUNSEL]: No argument, Judge.
>
> THE COURT: Does that mean you agree?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Have you talked to Mr. Turner about this?
>
> [DEFENSE COUNSEL]: Yes.

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

THE COURT: Does he understand it?

[DEFENSE COUNSEL]: Yes, he does.

THE COURT: Does he agree with the lesser included?

[DEFENSE COUNSEL]: Yes.

THE COURT: Mr. Turner.

DEFENDANT: Yes.

THE COURT: Did you hear what your attorney said?

DEFENDANT: Yeah.

Before accepting the stipulation, the circuit court engaged Turner in a further colloquy to ensure that he understood what a lesser-included offense meant and why third-degree sexual assault was a lesser-included offense of second-degree sexual assault. That colloquy was as follows:

> THE COURT: In this case, you're charged with second degree sexual assault, Count 3, and the State is indicating if the jury can't find you guilty of second degree sexual assault, they should consider third degree sexual assault. Do you understand that?
>
> DEFENDANT: Yes.
>
> THE COURT: It is called a lesser included because it is a less serious crime. But they still have a right if they can't find you guilty unanimously on Count 3, second degree sexual assault, they can consider whether you're guilty of – unanimously of third degree sexual assault. Do you understand that?
>
> DEFENDANT: Yes.
>
> THE COURT: Your attorney says that on behalf of you, that he's agreeing to have that included as a question to the jury. Do you understand that?
>
> DEFENDANT: Yes.
>
> THE COURT: Do you agree or disagree with what he said?
>
> DEFENDANT: I agree with him.

> THE COURT: … Second degree sexual assault as charged requires three elements. The defendant had sexual intercourse with [F.M.C.], number one; number two, [F.M.C.] did not consent to the sexual intercourse; number three, the defendant had sexual intercourse with [F.M.C.] by use or threat of force or violence. And the lesser included count of third degree sexual assault is – that contains these two elements. One, that the defendant had sexual intercourse with [F.M.C.]; number two, [F.M.C.] did not consent to the sexual intercourse. So the difference between second degree and third degree is that third degree drops the defendant had sexual intercourse with [F.M.C.] by use of threat or violence. Do you understand that, Mr. Turner?
>
> DEFENDANT: Yes.

Based on the parties' stipulation and trial evidence, the circuit court determined that instructing the jury on the lesser-included offense of third-degree sexual assault was appropriate. Ultimately, the jury found Turner guilty of that offense and acquitted him on the remaining charges.

After sentencing, Turner's appointed counsel filed a postconviction motion, arguing that (1) the circuit court erred in instructing the jury on the lesser-included offense; and (2) there was insufficient evidence to support Turner's conviction. The circuit court denied the motion without an evidentiary hearing. This appeal follows.

On appeal, Turner first contends that the circuit court erred in instructing the jury on a lesser-included offense. The test for submitting a lesser-included offense to the jury is whether "there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***State v. Kramar***, 149 Wis. 2d 767, 792, 440 N.W.2d 317 (1989). Here, we are satisfied that such grounds existed based upon the testimony of F.M.C., which made clear that she did not consent to the sexual intercourse but placed Turner's alleged

use or threat of force or violence at issue. Moreover, Turner waived his right to challenge the instruction by virtue of his stipulation to it.

Turner next asserts that there was insufficient evidence to support his conviction. In reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the [S]tate 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." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Again, at trial, F.M.C. made clear that she did not consent to the sexual intercourse with Turner.[2] Her testimony alone was sufficient to support Turner's conviction for third-degree sexual assault.

Turner next complains that his postconviction counsel was ineffective "for not presenting or adequately arguing" the above issues. This complaint fails for at least two reasons. First, counsel did raise the above issues in his postconviction motion. Second, even if counsel did not argue them in the manner that Turner wished, we have already determined them to be without merit. Failing to adequately argue a meritless issue is not deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Finally, Turner maintains that he was entitled to an evidentiary hearing on his postconviction claims. A circuit court may deny a postconviction motion without an evidentiary hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record

[2] F.M.C. testified, "I told [Turner] to stop. He wouldn't stop. I told him to get off me. He wouldn't get off me. He pinned my right arm down on the couch and then he just forced it in."

conclusively demonstrates that the movant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (footnote omitted). Because the record conclusively demonstrated that Turner was not entitled to relief, the circuit court did not err in denying his motion without an evidentiary hearing.[3]

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

[3] Turner's brief also makes passing reference to alleged due process and ex post facto violations. Because those claims are undeveloped, we do not consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). To the extent we have not addrTuressed any other argument raised by Turner on appeal, the argument is deemed rejected. *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.").