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**DISTRICT IV**

February 6, 2018

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

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2016AP2457-CR State of Wisconsin v. Jesse J. Madison (L.C. # 2014CF307)

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

**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).**

Jesse Madison appeals a judgment of conviction for second-degree sexual assault of a child, as a repeater, as well as the circuit court's denial of his postconviction motion for a new trial. Madison argues that he is entitled to a new trial because a prejudicial exhibit mistakenly went to the jury. Alternatively, Madison argues that he received ineffective assistance of counsel due to his attorney's failure to seek a mistrial or take other corrective measures. 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 (2015-16).[1] We conclude that an evidentiary hearing is necessary for Madison's ineffective assistance of counsel claim. We therefore reverse the order denying Madison's motion and remand the matter to circuit court for a ***Machner***[2] hearing.

Madison was charged with three counts of second-degree sexual assault of a child, as a repeater, after fifteen year-old HW was found in Madison's home. Madison pleaded not guilty, and was convicted after a jury trial. We need not repeat the details of the evidence against Madison. Suffice to say that HW testified, and the defense attempted to discredit him as a liar. There was also testimony from the nurse who conducted a forensic examination of HW on the morning after HW was found in Madison's home. Because the nurse could not remember verbatim what HW said to her, the State asked her to use her report to refresh her recollection.

After approximately a half hour of deliberations, the jury requested the nurse's report, along with several other exhibits. Madison's attorney objected, arguing that some of the exhibits contained inadmissible hearsay. Specifically, the defense attorney argued that the nurse's report contained information that the jury had not heard. The circuit court determined that the report should not go to the jury. However, shortly thereafter, the circuit court inadvertently sent the report to the jury, without objection.[3] Later, the defense attorney reconsidered whether the report

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] Specifically, the circuit court states, "Okay, here's 14," which presumably refers to Exhibit 14, the nurse's report. The bailiff then states, "This will go in now, Judge." The court responds, "Yep, okay." It is not clear from the transcript whether either attorney noticed this exchange.

should go to the jury, suggesting that it should go to the jury in redacted form. A lengthy discussion regarding necessary redactions ensued, both on the record and off the record. However, eventually it became clear that the jury had already received the report in unredacted form. The court decided to send the jury a second copy of the report with the agreed redactions. Defense counsel did not ask for the retrieval of the unredacted report, nor did counsel move for a mistrial. After two and a half more hours of deliberations, the jury found Madison guilty on all three counts.

Madison first argues that he is entitled to a new trial because the circuit court mistakenly sent the unredacted report to the jury. The problem with this argument is that Madison did not preserve this issue for appeal by taking immediate action upon learning that the jury had received the unredacted report, such as requesting its retrieval or moving for a mistrial. Madison contends that the circuit court was already aware of its mistake, so no action by counsel was necessary. We disagree. Madison's current argument that he is entitled to a new trial is wholly inconsistent with his attorney's failure to request a mistrial.[4] We therefore conclude that Madison has forfeited his argument that he was prejudiced by the court's error in sending the unredacted report to the jury. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (The forfeiture rule "prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.").

[4] Madison argues in his reply brief that we should address this issue under the plain error doctrine. *See* ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77 ("Plain error is 'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" (quoted source omitted)). We do not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. However, Madison is free to pursue this argument on remand.

However, this forfeiture gives rise to a possible claim of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 ("The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of ineffective assistance of counsel.'" (quoted source omitted)). The State points out that a postconviction evidentiary hearing is a prerequisite to pursuing a claim of ineffective assistance of counsel on appeal. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (a ***Machner*** hearing is necessary in order "to preserve the testimony of trial counsel" (quoting ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)).

Nonetheless, the State argues that Madison is not entitled to a ***Machner*** hearing because his allegations are too conclusory and speculative. We disagree. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "If the motion raises sufficient facts that, if true, show the defendant is entitled to relief, the circuit court must hold an evidentiary hearing." ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

Here, Madison has alleged that he was prejudiced because his attorney failed to take corrective steps upon learning that the jury mistakenly received the unredacted report. The State does not dispute that Madison sufficiently alleges deficient performance.[5] However, the State argues that Madison has not sufficiently alleged prejudice because the record is unclear as to

[5] Madison contends that a hearing is unnecessary because "[t]he State does not seem to dispute counsel performed deficiently," and prejudice can be determined from the record. Madison's assertion misreads the State's argument. The State argues, correctly, that Madison would need to prove both deficient performance and prejudice at an evidentiary hearing.

whether Madison was actually prejudiced by this error. This argument goes nowhere because Madison's motion provided ample factual detail as to how the error may have prejudiced his defense. Once a defendant has alleged sufficient facts, the circuit court may deny a hearing "if the record conclusively demonstrates that [Madison] is not entitled to relief." ***Balliette***, 336 Wis. 2d 358, ¶18 (quoted source omitted). Here, the fact that the record is inconclusive means that we must remand this matter for a ***Machner*** hearing. We make no comment on the parties' arguments about the proper scope of the ***Machner*** hearing, and instead leave that to the circuit court's determination.

Upon the foregoing reasons,

IT IS ORDERED that the order denying Madison's postconviction motion is summarily reversed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this matter is remanded to the circuit court for additional proceedings consistent with this order.

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

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*Diane M. Fremgen*
*Acting Clerk of Court of Appeals*