



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 IV

May 15, 2018

To:

Hon. James P. Daley
Circuit Court Judge
Rock County Courthouse
51 S. Main Street
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
51 S. Main Street
Janesville, WI 53545

David Andrew Bolles
Bolles Law Office, LLC
P.O. Box 1878
Madison, WI 53701

Jennifer Renee Remington
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Gerald A. Urbik
Asst. District Attorney
51 S. Main St.
Janesville, WI 53545

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

2017AP984-CR

State of Wisconsin v. Marquel Lajaun Johnson (L.C. # 2015CF418)

Before Sherman, Blanchard and Kloppenburg, 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).

Marquel Lajaun Johnson, by counsel, appeals his judgment of conviction and an order denying his postconviction motion. On appeal, Johnson argues that his trial counsel rendered ineffective assistance by failing to interview the victim of the battery supporting the charge to which Johnson pled guilty. Based upon our review of the briefs and the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We summarily affirm.

Johnson pled guilty to battery by a prisoner and was sentenced to eighteen months of initial confinement and three years of extended supervision. Johnson filed a postconviction motion to withdraw his plea, arguing that his trial counsel, Peter Bartelt, was ineffective for failing to interview the victim of the battery, J.B. Johnson asserted in the motion that, if J.B. had been interviewed, J.B. would have stated that he consented to the battery and did not consider himself a victim, thereby depriving the State of its ability to prove lack of consent, which is an element of the crime of battery by a prisoner. *See* WIS. STAT. § 940.20(1).

At the evidentiary hearing held on the postconviction motion, Bartelt testified that he did not interview J.B. because he did not think it would be useful. Prior to the plea hearing, Bartelt had reviewed a prison surveillance video of the battery incident, which included video but no sound. Bartelt testified that it appeared in the video that Johnson initiated the physical assault on J.B. without provocation. Bartelt further testified that, based on the video and police reports, he believed the State could prove its case and that it may not have been in Johnson's best interest for the court to view the video before sentencing. Bartelt testified that he did not recall Johnson ever telling him that J.B. had consented to being struck, and that if Johnson had told him something along those lines, he would have made notes about it.

Johnson also testified at the postconviction motion hearing. He acknowledged that he knew, before entering his plea, that Bartelt had not spoken with J.B. When the prosecutor asked

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

Johnson if he ever specifically told Bartelt that J.B. would say he consented to the battery, Johnson replied, “I didn’t specifically tell him anything.” The circuit court denied the motion for plea withdrawal, finding Bartelt to be credible and Johnson not to be credible. Johnson now appeals.

A claim for ineffective assistance of counsel presents a mixed question of fact and law, and we will uphold a circuit court’s factual findings so long as they are not clearly erroneous. *State v. LeMere*, 2016 WI 41, ¶23, 368 Wis. 2d 624, 879 N.W.2d 580. Here, the court relied heavily on credibility determinations when it denied Johnson’s postconviction motion. Generally, it is not the province of the reviewing court to determine issues of credibility. *State v. Wachsmuth*, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). We have no reason to conclude that the circuit court’s credibility determinations or the weight it afforded them should be overturned in this case. The circuit court found Bartelt’s testimony that Johnson never told him J.B. consented to the battery to be credible and, given that finding, we cannot conclude that Bartelt performed deficiently when he failed to interview J.B. “This court will not find counsel deficient for failing to discover information that was available to a defendant but that [the] defendant failed to share with counsel.” *State v. Nielsen*, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 482, 634 N.W.2d 325.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals