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**DISTRICT II**

October 31, 2018

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

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2017AP2086-CR                      State of Wisconsin v. Scott R. Gehner (L.C. #2015CF1016)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

**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).**

Scott R. Gehner appeals from judgments of conviction and an order denying his postconviction motion. 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).<sup>1</sup> We affirm.

In August 2016, Gehner was convicted by a jury of operating a motor vehicle with a prohibited alcohol concentration (5th or 6th offense). During the trial, the State presented an expert witness who testified to retrograde extrapolation calculations that showed Gehner's blood alcohol concentration at the time he had been driving. Gehner presented his own expert witness to challenge the reliability and applicability of those calculations. On cross-examination, Gehner's expert testified that he had previously been excluded from testifying in two cases. The expert clarified during Gehner's redirect that those cases did not involve his opinion on retrograde extrapolation. In its closing argument, the State compared the witnesses by stating, "[Gehner's expert] has been excluded from testifying previously. [The State's expert] has not." Gehner's counsel did not object to this line of argument.

Following trial, Gehner moved for postconviction relief, a motion the circuit court denied without an evidentiary hearing. Before this court, Gehner asserts that counsel was ineffective for failing to object during the State's closing argument.<sup>2</sup> In his postconviction motion, Gehner alleged that the State's reference to his expert's exclusion from testifying in other cases was materially improper. He further alleged that counsel's failure to object to this reference was prejudicial because the case boiled down to a "battle of the experts."

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

<sup>2</sup> He also describes counsel's performance as a failure to rebut or respond to the State's closing argument. To the extent these are separate arguments, they are not raised in his postconviction motion, and we need not consider them. *See State v. Allen*, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433 (reviewing only the allegations contained within the four corners of the postconviction motion).

To obtain an evidentiary hearing on a postconviction motion, a defendant must allege facts sufficient to warrant the relief requested. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether sufficient facts were alleged in the motion is a question of law that we review de novo. *Id.* If the motion presents insufficient or conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief, the decision to hold a hearing is within the circuit court’s discretion. *Id.* For claims of ineffective assistance of counsel, the factual allegations, if proven true, must establish both that counsel’s performance was deficient and that this deficient performance prejudiced the defendant. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Gehner’s motion was insufficient to entitle him to a hearing. In his motion, Gehner offered no justification for the assertion that counsel’s decision not to object was constitutionally deficient. The State used its closing argument to remind the jury of Gehner’s expert’s testimony regarding his previous exclusions from testifying in other cases. Counsel vigorously contested this matter during the witness’s redirect. Even so, the testimony was admitted without objection, a decision not challenged on appeal. Additionally, Gehner made no effort in his motion or before us to explain why objecting to the State’s closing argument would have created a reasonable probability of a different result. *Allen*, 274 Wis. 2d 568, ¶26 (“The defendant must also show the performance was prejudicial ....”). Given that Gehner failed to allege facts sufficient to satisfy either element of his ineffective assistance of counsel claim, his motion fails on its face. In turn, we conclude that the circuit court did not erroneously exercise its discretion in denying his motion without a hearing.

Upon the foregoing reasons,

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

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*