



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

November 13, 2018

To:

Hon. Robert P. VanDeHey
Circuit Court Judge
Grant County Courthouse
130 W. Maple St.
Lancaster, WI 53813

Tina McDonald
Clerk of Circuit Court
Grant County Courthouse
130 W. Maple St.
Lancaster, WI 53813

Patricia A. FitzGerald
Patricia A. FitzGerald Law Office
229 N. Grove St.
Mt. Horeb, WI 53572-1615

Lisa A. Riniker
District Attorney
130 W. Maple Street
Lancaster, WI 53813

Jacob J. Wittwer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2017AP2501-CR

State of Wisconsin v. Jay J. Saddler (L.C. # 2016CF64)

Before Lundsten, P.J., Sherman 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).

Jay Saddler appeals the circuit court's judgment convicting him of child abuse. Saddler also appeals the court's order denying his motion for postconviction relief. Saddler argues that the court erred by denying the motion without a hearing on Saddler's claim that trial counsel was

ineffective. 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 809.21.¹ We affirm.

The child abuse charge against Saddler was based on an incident in which Saddler allegedly caused burns to a child who Saddler was babysitting in Platteville. Saddler's counsel provided notice of an alibi defense, stating that Saddler intended to call five alibi witnesses to support Saddler's claim that Saddler was in Illinois at the time of the alleged incident. At trial, none of Saddler's alibi witnesses appeared, leaving Saddler as the only witness to testify in support of his alibi defense. The jury found Saddler guilty.

In claiming ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficiency prejudiced the defendant. *State v. Starks*, 2013 WI 69, ¶54, 349 Wis. 2d 274, 833 N.W.2d 146. To establish deficient performance, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the outcome would have been different. *Id.*, ¶55.

Whether Saddler's postconviction motion allegations, if true, entitle him to relief on his ineffectiveness claim is a question of law that we review de novo. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively

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

demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Id.*

In his postconviction motion, Saddler alleged that trial counsel was ineffective in failing to subpoena or otherwise ensure the presence of the five alibi witnesses. Saddler further alleged that, had these witnesses appeared, they would have corroborated Saddler’s claim that he was living in Illinois at the time of the alleged incident. Saddler argues that his motion allegations entitled him to a hearing. We disagree.

We assume, without deciding, that counsel performed deficiently, either by failing to subpoena the alibi witnesses or by failing to take other steps to help ensure the witnesses’ presence. Regardless, we conclude that Saddler cannot establish prejudice because the record demonstrates that Saddler chose to forgo the opportunity to seek a continuance and instead decided to proceed to trial without the alibi witnesses. As the State points out, the circuit court repeatedly raised the possibility of a continuance, including during a colloquy in which the court engaged Saddler personally, and Saddler stated that he wanted to proceed without the witnesses. Saddler’s decision to proceed without the witnesses breaks the causal link between the assumed deficient performance and possible prejudice to Saddler.

In his postconviction motion, Saddler also claimed that counsel performed deficiently by deferring to Saddler’s decision not to seek a continuance. Similarly, Saddler argues on appeal that the decision on whether to seek a continuance was a strategic decision that counsel should have made. We reject this argument as a basis for claiming ineffective assistance. Counsel does not act deficiently by following a client’s decision, even with respect to strategic decisions counsel is empowered to make without consulting the client. *See State v. Divanovic*, 200 Wis.

2d 210, 224, 546 N.W.2d 501 (Ct. App. 1996). Saddler relies on *State v. Brunette*, 220 Wis. 2d 431, 583 N.W.2d 174 (Ct. App. 1998), a case stating that counsel must have the power to make tactical decisions. *See id.* at 443. However, this statement from *Brunette* was in the context of a discussion as to which decisions are considered so fundamental as to be properly waived only upon a defendant's personal waiver. *See id.* *Brunette* does not stand for the proposition that counsel performs deficiently if counsel defers to a client's decision. We note that Saddler does not claim that counsel was deficient in advising Saddler on whether to proceed with trial or to seek a continuance.

Therefore,

IT IS ORDERED that the judgment of conviction and the order denying Saddler's postconviction motion are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals