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March 11, 2019

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

2018AP89 State of Wisconsin v. Earnest D. Beamon (L.C. # 2009CF1889)

Before Blanchard, 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).

Earnest Beamon, pro se, appeals a circuit court order denying his postconviction motion to withdraw his guilty plea to one count of child sexual assault. Beamon argues that the circuit court erred in denying him an evidentiary hearing on his claim that counsel was ineffective by failing to advise Beamon of a viable intoxication defense. Beamon also argues that the prosecutor breached the parties' plea agreement. 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) (2017-18).[1] We affirm.

According to the criminal complaint, Beamon came home intoxicated and, after engaging in conversation with his fiancée, the victim's mother, left the room and stated he would return in a minute. About ten minutes later, Beamon's fiancée went to the victim's bedroom and found Beamon on top of the victim in his boxer shorts with an erection. The victim reported that Beamon was "trying to put his private part in me," and that her "private parts" were wet afterward.

The parties entered into a plea agreement under which Beamon agreed to plead guilty to first-degree sexual assault of a child, sexual contact with a child under the age of thirteen, and the State agreed not to recommend any specific sentence length. The circuit court accepted Beamon's plea and sentenced Beamon to ten years of initial confinement and ten years of extended supervision.

We turn first to Beamon's argument that the circuit court erred in denying him an evidentiary hearing on his claim that counsel was ineffective by failing to advise Beamon of a viable intoxication defense. We reject this argument for the following reasons.

An evidentiary hearing is not required if "the defendant fails to allege sufficient facts in his [postconviction] motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v.***

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Sulla, 2016 WI 46, ¶27, 369 Wis. 2d 225, 880 N.W.2d 659 (quoted source omitted). We review de novo whether a hearing is required under these standards. *See* ***id.***, ¶23.

To show ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** Here, regardless of whether counsel performed deficiently, we conclude that Beamon's postconviction motion fails to sufficiently allege prejudice.

The voluntary intoxication defense that Beamon claims counsel should have advised him of requires evidence sufficient to show that the defendant's intoxication "[n]egatives the existence of a state of mind essential to the crime." *See* WIS. STAT. § 939.42(2) (2007-08). It requires evidence to support a finding that the defendant was "so intoxicated" as to be incapable of the requisite state of mind. *See* ***Larson v. State***, 86 Wis. 2d 187, 195, 271 N.W.2d 647 (1978) (referring to whether defendant was "so intoxicated that he lacked the intent to kill"). The elements of Beamon's crime, as relevant here, required intentional touching of the intimate parts of the victim. *See* WIS. STAT. §§ 948.01(5)(a) and 948.02(1)(e) (2007-08). Thus, a successful intoxication defense would have shown that Beamon was so intoxicated that he was incapable of intending to touch the intimate parts of the victim.

Beamon's postconviction motion and supporting affidavit include the following allegations: (1) Beamon would often black out after binge drinking; (2) on one occasion, upon

returning home after binge drinking, Beamon did not recognize his "wife," meaning apparently his fiancée, until a couple hours later; (3) on the night of the assault, Beamon had been on a twenty-four hour drinking binge and consumed over two quarts of 90-proof alcohol along with four ecstasy pills; (4) due to his extremely intoxicated state, Beamon did not know he was engaged in sexual activity with the victim and assumed it was his fiancée; (5) Beamon's attorney never advised him of an intoxication defense, and Beamon was not aware of any such defense; (6) if Beamon's attorney had advised him of the intoxication defense, Beamon would have instructed his attorney to hire an expert witness to support the defense; and (7) if Beamon's attorney had advised him of the intoxication defense, Beamon would not have pled guilty and instead would have chosen to go to trial.

Beamon argues that these allegations entitle him to a hearing because the allegations, if true, show that he had a viable intoxication defense such that a jury might have believed he intended to engage in sexual activity with his fiancée, not the victim. We disagree and conclude that, when we compare the allegations to Beamon's undisputed actions and other undisputed circumstances, Beamon's allegations are conclusory and insufficient to show that a voluntary intoxication defense was viable.

As summarized in the complaint and the circuit court's decision, these circumstances include that: (1) the victim was ten years old at the time of the assault; (2) Beamon and his fiancée were living together and had been in a relationship for seven years; (3) the assault occurred in the victim's bedroom shortly after Beamon finished talking to his fiancée in a different room and walked away from her; (4) at the time of the assault, two other children were in the same bed as the victim, and the victim was at the far end of the bed against the wall, meaning that Beamon had to crawl over two other children to reach the victim; (5) Beamon's

fiancée reported to police that Beamon's intoxication level was "normal" on the night of the incident, and that the conversation she and Beamon had immediately prior to the assault was "normal"; (6) when Beamon's fiancée last checked on the victim, the victim was sleeping on her stomach, but when Beamon's fiancée discovered Beamon with the victim, the victim was on her back with her shorts and underwear pulled down, suggesting that Beamon had turned the victim over and removed her clothing; (7) when Beamon's fiancée confronted Beamon on what he was doing, Beamon did not deny he was doing something wrong; and (8) the victim reported that Beamon was trying to put his "private part in me," and that her "private parts" were wet afterward, indicating that Beamon had been able to ejaculate.

Based on these circumstances, no reasonable jury could have found that Beamon was so intoxicated that he was incapable of intending to engage in sexual contact with the victim, and Beamon's conclusory motion allegations are insufficient to raise a serious factual question to the contrary. Absent such a showing that an intoxication defense was viable, Beamon's motion further fails to allege a reasonable probability that, but for counsel's failure to advise Beamon of that defense, the result of the proceeding would have been different.

Beamon argues that it is incorrect to apply the prejudice test from ***Strickland*** in the plea context, and that the correct test is set forth in ***Hill v. Lockhart***, 474 U.S. 52 (1985). Beamon points to the Court's statement in ***Hill*** that prejudice in the plea context requires a "reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *See* ***id.*** at 59. Beamon argues that, applying the ***Hill*** prejudice test, his motion allegations are sufficient. We disagree.

The prejudice analysis under ***Strickland*** and ***Hill*** is fundamentally the same. *See* ***id.*** at 58 ("We hold … that the two-part ***Strickland v. Washington*** test applies to challenges to guilty pleas based on ineffective assistance of counsel."). Applying the relevant language from ***Hill*** does not change our analysis. For the same reasons he failed to allege a reasonable probability of a different result, Beamon also failed to allege a reasonable probability that he would not have pled guilty. Under ***Hill***, as under ***Strickland***, our analysis depends on the viability of an intoxication defense. "[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." ***Id.*** at 59.

Beamon argues that the circuit court erred by making subjective credibility determinations instead of applying a reasonable probability test. We disagree that the circuit court applied a subjective standard. Regardless, our review is de novo, and we have applied an objective test based on our pleading standards and ***Strickland*** and ***Hill***.

We turn to Beamon's argument that the prosecutor breached the plea agreement. In summarizing the agreement at the plea hearing, the prosecutor explained that the State was agreeing to "not recommend a specific length of time but, rather, would leave the amount of time up to the discretion of the Court." Beamon argues that the prosecutor breached this agreement, either directly or indirectly, in several ways at sentencing. *See* ***State v. Ferguson***, 166 Wis. 2d 317, 322, 479 N.W.2d 241 (Ct. App. 1991) (prosecution may not accomplish through indirect means what it promised not to do directly in a plea agreement). We disagree.

First, Beamon argues that the prosecutor breached the agreement by informing the court at sentencing that the State was uncertain whether the assault involved "penetration or attempted penetration or just contact …, but certainly there was sexual contact." According to Beamon, this comment implied that Beamon engaged in a more serious crime than the sexual contact crime to which he pled. We disagree and conclude that the comment is most reasonably read as an acknowledgment that the State lacked clear evidence of intercourse. Regardless, the comment was not an express or implied request for any particular sentence length.

Second, Beamon argues that prosecutor breached the agreement by asserting at sentencing that Beamon needed to be "punished." This comment, like the previous one, was not an express or implied request for any particular sentence length, especially given that the prosecutor began and ended his sentencing remarks by reiterating the State's agreement to make no recommendation as to the length of Beamon's sentence.

Finally, Beamon argues that the prosecutor breached the agreement by making negative assertions about Beamon's credibility and character. Such comments, like both previous comments, were not an express or implied request for any particular sentence length. The prosecutor did not agree to make only positive comments about Beamon. *See **id.*** at 324 (plea agreement cannot bar prosecutor from informing the court of aggravating factors).

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to 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