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DISTRICT I

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

2018AP1067-CR State of Wisconsin v. Antonio Manuel Hernandez
(L.C. # 2015CF3609)

Before Brash, P.J., Brennan and Dugan, 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).

Antonio Manuel Hernandez appeals a judgment, entered upon a jury's verdicts, convicting him of two counts of first-degree sexual assault of a child. He also appeals an order denying postconviction relief.[1] Based upon our review of the briefs and record, we conclude at

[1] The Honorable Thomas J. McAdams presided over the trial and entered the judgment of conviction. The Honorable Mark A. Sanders presided over the postconviction proceedings and entered the order denying postconviction relief.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[2] We affirm.

A.N.M., born July 23, 2007, disclosed in August 2015 that Hernandez, a family friend and houseguest, awakened her on August 3, 2015, by rubbing her vagina and trying to kiss her. A.N.M.'s half-sister, A.A.R., born March 7, 2006, similarly disclosed that in early February 2015, Hernandez awakened her by rubbing her buttocks beneath her underwear and trying to kiss her. The State charged Hernandez with two counts of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1)(e). Hernandez denied the allegations, and the matters proceeded to a jury trial in December 2016. The jury found him guilty as charged.

Hernandez moved for postconviction relief claiming that: (1) his trial counsel was ineffective for failing to investigate his competency to stand trial and for failing to seek an *in camera* review of the children's medical records; (2) the evidence was insufficient to convict him; (3) the circuit court erred by permitting J.R., the mother of A.N.M. and A.A.R., to remain in the courtroom while the children testified; and (4) the circuit court erred by not declaring a mistrial after dismissing a member of the jury and by collectively rather than individually questioning the remaining jurors about the dismissed juror. The circuit court denied the claims without a hearing, and Hernandez appeals. We discuss further facts as necessary to address the issues that he pursues.

[2] The State charged Hernandez with committing crimes and brought him to trial while the 2015-16 version of the Wisconsin Statutes was in effect. Therefore, all subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

We begin by addressing Hernandez's claims of ineffective assistance of trial counsel. A defendant who claims that counsel was ineffective must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, a defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate 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. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. *See* ***Strickland***, 466 U.S. at 697.

As with other postconviction motions, a claim of ineffective assistance of counsel does not automatically earn a defendant a postconviction hearing. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 12-13, 274 Wis. 2d 568, 682 N.W.2d 433. A hearing is required only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***id.***, ¶14. Whether the motion is sufficient to require a hearing is another question of law for our independent review. *See* ***id.***, ¶9. If the defendant does not allege sufficient material facts, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review a circuit court's discretionary decisions with deference. *See* ***id.***

Hernandez claims that his trial counsel was ineffective for conducting an insufficient investigation into his competency to stand trial. The record reflects that trial counsel questioned Hernandez's competency early in the prosecution, and the circuit court suspended the

proceedings to permit a mental examination. A psychiatrist conducted an outpatient evaluation and was unable to reach a conclusion but opined that "there is a high likelihood that [Hernandez] is feigning disorientation." The circuit court therefore ordered an inpatient examination. A second psychiatrist evaluated Hernandez while he was confined at a mental health institution and filed a report opining that Hernandez "has substantial mental capacity to understand the [legal] proceedings and assist in his own defense." At a subsequent hearing, neither Hernandez nor his trial counsel disputed that Hernandez was competent, and the proceedings resumed.

According to Hernandez, his trial counsel performed deficiently by failing to obtain "an independent medical examination of Hernandez" following the court-ordered outpatient and inpatient assessments. We reject the claim. "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Prescott***, 2012 WI App 136, ¶11, 345 Wis. 2d 313, 825 N.W.2d 515 (citation omitted). Hernandez does not make any showing as to what the outcome of a third examination would have revealed, let alone how it would have changed the course of the proceedings in this case. The claim therefore fails.

Hernandez also claims that his trial counsel was ineffective for failing to seek an *in camera* review of the children's medical records. Whether to grant an *in camera* review of a victim's confidential medical and psychiatric records is governed by ***State v. Shiffra***, 175 Wis. 2d 600, 605-08, 499 N.W.2d 719 (Ct. App. 1993), *modified by* ***State v. Green***, 2002 WI 68, ¶¶30-34, 253 Wis. 2d 356, 646 N.W.2d 298. To obtain review, the defendant must make a preliminary showing, setting forth "in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination

of guilt or innocence and is not merely cumulative to other evidence available to the defendant." ***Green***, 253 Wis. 2d 356, ¶34. The burden of proof is on the defendant, *see* ***id.***, ¶20, who "must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense," ***id.***, ¶33. "[S]peculation or conjecture as to what information is in the records" is not a substitute for a fact-specific showing. *See* ***id.***

As the circuit court accurately explained in its postconviction order, Hernandez failed to make an evidentiary showing "articulating any facts that would go to guilt or innocence with respect to the victims' treatment records." Rather, Hernandez stated in his postconviction motion that "both victims had been in therapy and taking medications for mental health issues." That statement plainly does not constitute the required "specific factual basis" for connecting the records with the charges. *See* ***id.***, ¶34. On appeal, Hernandez seeks to bolster his claim with an argument that the victims' participation in therapy itself "demonstrate[s] there was a reasonabl[e] likelihood the records may contain information necessary to determine guilt or innocence." Hernandez is wrong. A showing that a victim received mental health treatment reveals "nothing more than 'the mere possibility' that the records 'might produce some evidence helpful to the defense.'" *See* ***State v. Munoz***, 200 Wis. 2d 391, 397, 546 N.W.2d 570 (Ct. App. 1996) (citation and emphasis omitted). Indeed, psychiatric counseling, "standing alone ... has no relevance." *See* ***id.*** at 399. Because Hernandez failed to demonstrate that he could make the showing necessary to obtain an *in camera* hearing, he necessarily failed to demonstrate that his trial counsel performed deficiently by not seeking such a hearing. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (stating that forgoing a meritless claim is not deficient performance).

Hernandez next argues that the evidence was insufficient to sustain his convictions. When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that ... no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The credibility of witnesses is for the jury to decide, as is the weight of the evidence. *See* ***id.*** at 504.

To obtain a conviction for first-degree sexual assault of a child, the State must prove beyond a reasonable doubt that: (1) the defendant had sexual contact with the victim; and (2) the victim was under the age of thirteen years at the time of the sexual contact. *See* WIS JI—CRIMINAL 2102E. Here, A.N.M. testified that she knew Hernandez because at one time he lived with her family. She said that when she was eight years old, he approached her while she was in bed, pulled down her pants, and touched her private parts, which she uses "to pee." The jury also watched a video of the forensic interview that a police officer conducted with A.N.M., in which she described how Hernandez "started to rub [her] private" and tried to kiss her. Similarly, A.A.R. testified that when she was eight or nine years old, Hernandez came into her room at night and touched her buttocks. The jury also watched a video of a forensic interview with A.A.R., in which she said that Hernandez "rubbed [her] butt" under her clothes. While the State presented additional evidence to support the charges, the victims' testimony alone was a sufficient basis for the jury to find Hernandez guilty of two counts of first-degree sexual assault of a child. *See* ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993).

Hernandez nonetheless proposes two reasons that the evidence was insufficient to prove his guilt. First, he notes that A.A.R. acknowledged during her forensic interview that she once had a dream that Hernandez was in her room, and he therefore contends that "it is entirely possible that A.A.R.'s claims could have been bad dreams." This argument is unavailing. "[O]ur duty when reviewing the sufficiency of evidence supporting a jury verdict of guilty is not to ask what is 'possible.' Anything, after all, is possible." ***State v. Smith***, 2012 WI 91, ¶44, 342 Wis. 2d 710, 817 N.W.2d 410. We are required instead "to decide whether 'any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial.'" *See* ***id.*** (citation omitted). Because the evidence permitted the jury to find Hernandez guilty of assaulting A.A.R., we will not speculate about possibilities that might have led to other outcomes.

Second, Hernandez challenges the sufficiency of the evidence on the ground that A.N.M. and A.A.R. each provided some details about her interactions with Hernandez that were arguably inconsistent with other testimony. This contention does not aid him. "Where there are inconsistences within a witness's testimony or between witnesses' testimonies, the jury determines the credibility of each witness and the weight of the evidence." ***Sharp***, 180 Wis. 2d at 659. Indeed, "[i]t is not our appellate function to upset the verdict based on testimonial inconsistences." ***State v. Daniels***, 117 Wis. 2d 9, 18, 343 N.W.2d 411 (Ct. App. 1983). Accordingly, we reject Hernandez's challenge to the sufficiency of the evidence.

Hernandez next claims that the circuit court erred by permitting J.R. to remain in the courtroom while the children testified. Hernandez contends that the circuit court should not have overruled his objection to partially exempting J.R. from the sequestration order in this matter

because, he says, J.R.'s presence in the courtroom created a risk that the children would shape their testimony to please her. We are not persuaded.

"Sequestration of witnesses is within the discretion of the [circuit] court." ***State v. Evans***, 2000 WI App 178, ¶7, 238 Wis. 2d 411, 617 N.W.2d 220. The scope of a sequestration order is similarly discretionary. *See* ***State v. Copeland***, 2011 WI App 28, ¶8, 332 Wis. 2d 283, 798 N.W.2d 250. "[A]s we have often said, our review of discretionary determinations is deferential: we do no more than examine the record to gauge whether the circuit court reached a reasonable conclusion based on proper legal standards and a logical interpretation of the facts." ***Evans***, 238 Wis. 2d 411, ¶7.

Because J.R. was the mother of victimized children, she was herself a victim within the meaning of WIS. STAT. § 950.02(4)(a)2., and therefore she had a right to be present at the proceedings unless the circuit court found that her exclusion was necessary to afford Hernandez a fair trial. *See* WIS. STAT. §§ 906.15(2)(d), 950.04(1v)(b). In deciding whether to allow J.R. to remain in the courtroom while her children testified, the circuit court considered the statutory mandates and the State's explanation that the children would feel more comfortable testifying if their mother was present. The circuit court recognized the possibility that J.R. might somehow influence the girls' testimony and therefore ordered that J.R. must sit in the back of the courtroom behind a glass partition, more than forty feet away from the witness stand. The circuit court indicated both that J.R. would be required to leave the courtroom if she displayed any emotion and that the circuit court would take action if alerted to any problematic behavior. In sum, the circuit court considered relevant facts in light of the applicable law and reached a reasonable conclusion that addressed the various concerns of the defendant, the victims, and the State. Accordingly, no basis exists to disturb the circuit court's discretionary decision. *See*

State v. Prineas, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 (stating that "our inquiry is whether discretion was exercised, not whether it could have been exercised differently").

Last, Hernandez claims that the circuit court erred by refusing either to conduct an individualized voir dire of each juror or to grant a mistrial after Juror 13 was dismissed from the jury panel. We reject both claims.

On the third day of trial, Juror 13 claimed in a note he submitted to the circuit court that he had recovered a memory of seeing Hernandez assaulting A.N.M. The circuit court sent the other jurors to the jury room and questioned Juror 13. He told the circuit court that the previous night he had suddenly recalled that he was present during the assault and could not prevent the crime because Hernandez had a gun. The juror also said he had not shared this information with anybody else on the jury. The circuit court then dismissed Juror 13.

The morning trial session resumed, but after the lunch break Hernandez advised that he had "a concern that the jury panel may have been tainted." He suggested that the circuit court grant a mistrial, and he asked to question the remaining jurors individually about anything they had heard from Juror 13. The circuit court proposed instead to ask the jurors collectively if Juror 13 had shared any information with anybody on the panel and then determine from the collective responses whether further inquiry was required. Hernandez did not object, and the circuit court proceeded as it had suggested. One juror responded that Juror 13 "did not in fact say anything." The circuit court made a record that everyone else on the panel was "shaking their head[s] no." The trial resumed without further inquiry to the jurors and without objection from Hernandez.

In postconviction proceedings, Hernandez alleged that the circuit court should have polled the other jurors individually about Juror 13 and should have granted a mistrial. In support, he said that "[i]t is unknown what Juror 13 could have told the other members of the jury," and that "it is possible Juror 13 tainted ... other members of the jury." The circuit court denied the claims, stating that Hernandez did not present anything that suggested any of the jurors withheld information when questioned collectively.

On appeal, Hernandez again asserts that the circuit court erred by not questioning the jurors individually after Juror 13's disclosure. We conclude that Hernandez forfeited the claim by failing either to object to the collective questioning conducted by the circuit court or to insist on further questioning after the circuit court concluded its inquiry. A specific and contemporaneous objection to a perceived circuit court error is normally required to preserve a claim for appeal. *See* ***State v. Davis***, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996). More particularly, a party must make a contemporaneous objection to the sufficiency of jury polling. *See* ***State v. Cydzik***, 60 Wis. 2d 683, 696, 211 N.W.2d 421(1973) (holding that any claim of deficient questioning is forfeited for appeal if the defendant does not seek individual polling after the jury is collectively questioned). We are satisfied that the contemporaneous objection rule governs the claim here and dictates that it is forfeited.

Moreover, were we to conclude that Hernandez preserved his claim, we would deny it. A circuit court has broad discretion over the examination of jurors. *See* ***Hammill v. State***, 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979). Accordingly, we will uphold the circuit court's procedure absent a showing that the circuit court acted unreasonably or in violation of the law. *See* ***State v. Van Straten***, 140 Wis. 2d 306, 314, 409 N.W.2d 448 (Ct. App. 1987). Hernandez

has neither shown that the circuit court acted unreasonably by conducting a collective inquiry nor identified any legal authority mandating that the circuit court proceed differently than it did.

We turn to the claim that the circuit court should have granted a mistrial in the wake of Juror 13's disclosure. A defendant has a right to an impartial jury and "[j]uror impartiality may ... be undermined when extraneous information reaches one or more jurors prior to a jury's verdict." *See* ***State v. Faucher***, 227 Wis. 2d 700, 715, 728, 596 N.W.2d 770 (1999). Whether a juror's exposure to extraneous information constitutes prejudicial error is a question of law. ***Id.*** at 728. The inquiry ends, however, if the defendant fails to prove that any alleged extraneous information reached any juror who participated in deliberations. *See* ***id.*** at 729 & n.7. Here, Hernandez failed to show that any juror who decided his case received any extraneous information from Juror 13. When questioned mid-trial, the jurors all told the circuit court that they had not received any such information. Hernandez had an additional opportunity in postconviction proceedings to show that one or more members of the jury that heard his case improperly received extraneous information. His postconviction submissions failed to demonstrate that he could make such a showing. Accordingly, the circuit court properly denied the claim. *See* ***id.*** For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

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

Sheila T. Reiff
Clerk of Court of Appeals