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November 21, 2019

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

2018AP1241-CR State of Wisconsin v. Willie Belmontes (L.C. # 2016CF3411)

Before Brash, P.J., Kloppenburg 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).

Willie Belmontes appeals a circuit court judgment convicting him of two counts of strangulation and suffocation, one count of misdemeanor battery, one count of disorderly conduct, and one count of criminal damage to property. Belmontes also appeals the court's order denying his postconviction motion in which he argues that his 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.

According to the criminal complaint, the charges against Belmontes stemmed from a July 2016 domestic abuse incident in which Belmontes repeatedly assaulted the victim, with whom he was living at the time. In two separate instances, Belmontes wrapped a rope around the victim's neck and pulled it tight, impeding her ability to breathe. When Belmontes tried to strangle the victim a third time, she attempted to use her cell phone to call the police, and Belmontes grabbed the phone and smashed it. He then pushed the victim's head into a wall. The victim went to a door where Belmontes' mother was present, at which point Belmontes shoved the victim to the floor and slapped her several times. Eventually the victim was able to FaceTime her sister using an iPad and ask her sister to call the police.

Belmontes' case proceeded to a jury trial. The victim testified, and her version of events was corroborated by other evidence that included photographs of her neck taken shortly after the incident; testimony from her sister, who had arrived at the scene around the same time as the police; and a recording of the FaceTime call that the victim made to her sister. The police admitted that they failed to collect the rope as evidence. The defense attempted to suggest that the victim self-inflicted her injuries with the rope. The jury found Belmontes guilty on each of the five charges.

Belmontes filed a postconviction motion and affidavit claiming that his trial counsel was ineffective in multiple respects. The circuit court denied the motion without an evidentiary hearing. We reference additional facts as needed below.

In reviewing the circuit court's decision, we examine whether Belmontes' motion "on its face alleges sufficient material facts that, if true, would entitle [Belmontes] to relief." *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents a question of law that we review *de novo*. *See* ***id.*** "If the motion raises such facts, the circuit court must hold an evidentiary hearing." ***Id.*** However, the court need not hold a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.***

Applying these standards here, we conclude for the reasons that follow that the circuit court properly rejected each of Belmontes' ineffective assistance claims without holding an evidentiary hearing.

To demonstrate ineffective assistance of trial counsel, a defendant must establish: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the 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.

Belmontes first contends that trial counsel was ineffective by failing to raise a claim that the police violated his right to due process by failing to collect the rope for purposes of DNA testing. We reject this argument because we conclude that Belmontes' motion does not sufficiently allege a due process violation.

To establish a due process violation based on failure to preserve evidence, a defendant must show one of two alternatives. *See* ***State v. Greenwold*** (***Greenwold II***), 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). The first alternative is that the police "failed to preserve …

evidence that is apparently exculpatory." ***Id.*** The second alternative is that the police "acted in bad faith by failing to preserve evidence which is potentially exculpatory." ***Id.***

Belmontes alleged in his postconviction motion that the police already knew that Belmontes denied strangling the victim with the rope when they failed to collect the rope. Belmontes also pointed out that the police admitted at trial that they made a mistake by not collecting the rope. Additionally, Belmontes alleged that the rope would have been subjected to DNA testing if police had collected it. Belmontes further alleged that "if the rope was tested and [his] DNA did not show up on the rope, then there would be irrefutable evidence that [the victim] lied about [his] using the rope."

As to the first alternative of the due process test, the allegations in Belmontes' postconviction motion, even if true, are insufficient to establish that the rope was apparently exculpatory. Evidence is not apparently exculpatory when "'no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.'" *See* ***State v. Greenwold*** (***Greenwold I***), 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (citation omitted). As far as we can tell from Belmontes' allegations, this is precisely the situation here: the rope was evidence that "could have been subjected to tests, the results of which *might* have exonerated" Belmontes. *See* ***id.*** (emphasis added, citations omitted). Whether the rope turned out to be exculpatory depended, at a minimum, on DNA testing. Further, neither the allegations in Belmontes' motion, nor any other evidence Belmontes references, indicates that the police had reason to believe that DNA testing was more likely to exonerate Belmontes than it was to incriminate him.

As to the second alternative of the due process test, Belmontes' allegations do not establish bad faith. Bad faith requires a showing not only that the police were aware that the evidence was potentially exculpatory or useful, but also that the police "acted with official animus or made a conscious effort to suppress" the evidence. *See* ***Greenwold II***, 189 Wis. 2d at 69. Neither the allegations in Belmontes' motion nor any other evidence he references is sufficient to support a claim that the police acted with official animus or made a conscious effort to suppress the rope.

Therefore, we conclude that the State did not violate Belmontes' due process rights in failing to collect and test the rope, and that his trial counsel was not ineffective for failing to file a motion to dismiss on that issue.

Belmontes further argues that trial counsel was ineffective in other ways relating to the rope. He alleges that, at trial counsel's direction, he collected the rope from his home and provided it to trial counsel so that counsel could have it tested for DNA. He states that trial counsel never tested the rope for DNA. Belmontes also argues that trial counsel intentionally hid the rope from the State until trial. Further, he argues that if the State knew about the rope, it could have had the rope tested for DNA which would have supported his defense. Lastly, Belmontes argues that because trial counsel violated the State's right to discovery by failing to disclose the rope, the State was permitted to argue in closing that Belmontes intentionally hid the rope, resulting in an inference of guilt.

The problem with Belmontes' claims is that he failed to raise them with sufficient clarity, if he raised them at all, in his postconviction motion. The postconviction court's decision thus understandably did not provide separate analysis for all of these claims. We generally do not

address arguments raised for the first time on appeal. *See* ***Northbrook Wisconsin, LLC v. City of Niagara***, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851.

However, in the interest of being complete, we address these arguments regarding ineffective assistance. Regardless of whether trial counsel performed deficiently, we conclude that Belmontes' motion fails to allege prejudice on these grounds. We will assume, without deciding, that there were procedural means available to trial counsel to ensure the proper collection and DNA testing of the rope. Even so, Belmontes' motion fails to sufficiently allege a reasonable probability that the results of such collection and testing would have led to a different result at trial. *See* ***Strickland***, 466 U.S. at 694.

The allegations in Belmontes' motion do not provide supporting detail explaining any likely value of the DNA evidence involved in this case. In particular, Belmontes does not provide supporting allegations explaining why or how the absence of his DNA on the rope would have been conclusive as to the question of whether he used the rope to strangle the victim. *See* ***Allen***, 274 Wis. 2d 568, ¶23 (explaining that a sufficient postconviction motion alleges "who, what, where, when, why, and how"). Belmontes' allegation that the absence of his DNA on the rope would have been "irrefutable" evidence that the victim lied is conclusory, and it ignores other evidence that corroborated the victim's testimony.

Second, once the police failed to collect the rope, its evidentiary value was diminished by the difficulty in establishing a reliable chain of custody. Regardless of trial counsel's actions, there would have been some period of time after the incident when the rope remained in Belmontes' home and was subject to tampering. It is unlikely that the jury would have believed

that the absence of Belmontes' DNA on the rope outweighed all of the other evidence incriminating him.

Belmontes makes one further argument relating to the rope. He argues that trial counsel was ineffective by failing to disclose the rope to the State, in violation of discovery rules, and by attempting to use the rope as evidence at trial. Belmontes argues that he was prejudiced by this conduct because it led to the circuit court's ruling that the State could argue to the jury that the defense deprived the State of the opportunity to test the rope for DNA. However, Belmontes identifies no place in the record where the State took advantage of this ruling by so arguing. Accordingly, Belmontes does not show prejudice.

Belmontes' remaining arguments relate to the charge for criminal damage to property that was based on the victim's allegation that Belmontes smashed her cell phone. To prove that Belmontes was guilty of this charge, the State had to show that Belmontes "intentionally cause[d] damage to any physical property of another without the person's consent." *See* WIS. STAT. § 943.01(1) (2013-14).[1]

Belmontes contends that trial counsel was ineffective by failing to move to dismiss this charge at the close of the State's case for lack of evidence that the phone was "property of another." We conclude that Belmontes cannot show ineffective assistance of trial counsel on this basis because the evidence was sufficient to support a finding that the phone was the victim's property.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

We first note that there is a disconnect between the parties' arguments and the instructions the jury received. The parties' arguments reference the statutory definition of "'[p]roperty of another'" as "property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property." WIS. STAT. § 939.22(28). However, the jury was not instructed on this definition.[2]

Regardless of whether we consider the "property of another" definition or not, we conclude that the victim's testimony provided sufficient evidence that the phone was her property. The victim testified that she purchased the phone or made the down payment on it. She also testified that she paid money toward the phone bill. Belmontes points to evidence that

[2] The jury was instructed as follows:

> Criminal damage to property as defined in section 943.01 of the Criminal Code of Wisconsin is committed by one who intentionally causes damage to the physical property of another person without the consent of that person.
>
> Before you may find the defendant guilty of this offense, the State must prove …:
>
> One, the defendant caused damage to physical property.
>
> The word damage includes anything from mere defacement to total destruction.
>
> Two, the defendant intentionally caused the damage.
>
> ….
>
> Three, the property belonged to another person. Four, the defendant caused the damage without the consent of [the victim].
>
> Five, the defendant knew that the property belonged to another person and knew that the other person did not consent to the damage.

the phone contract was solely in his name. However, he does not establish as a factual or legal matter that the name on the contract determined ownership of the phone. At most, Belmontes establishes that there were competing reasonable inferences regarding ownership of the phone. The jury was free to choose among those inferences. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (stating that "the trier of fact is free to choose among conflicting inferences" as long as the chosen inference is reasonable).

Finally, Belmontes argues that trial counsel was ineffective by failing to cross-examine the victim about legal ownership of the phone. This argument fails because Belmontes' postconviction motion does not allege what answers the victim would have given about legal ownership, let alone how those answers would have been reasonably probable to result in a jury finding that the phone was not the property of another.

IT IS ORDERED that the circuit court's judgment and order are 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