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March 25, 2020

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

2018AP2280 State of Wisconsin v. Jacob M. McCann (L.C. #2010CF542)

Before Neubauer, C.J., Gundrum and Davis, 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).

Jacob McCann appeals pro se from an order denying his WIS. STAT. § 974.06 (2017-18)[1] motion without a hearing. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

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

McCann was convicted in 2011 in Winnebago County Case no. 10CF542 of one count of repeated sexual assault of a child. He filed a postconviction motion alleging that trial counsel was ineffective for failing to call the victim's sister to testify, claiming her testimony would have undermined the victim's credibility. He asserted in the alternative that, as the jury did not hear this testimony, the real controversy was not fully tried, warranting a new trial in the interest of justice. After a ***Machner***[2] hearing, the court found counsel's decision to be reasonable and not prejudicial, and denied McCann's motion. McCann appealed and this Court affirmed. His petition for review was denied.[3]

In November 2017, McCann filed a petition for a writ of habeas corpus and a motion for a substitution of Judge John Jorgenson in that case, Winnebago County Case no. 18CV69. Another judge denied the writ petition in February 2018.

In October 2018, McCann filed a WIS. STAT. § 974.06 motion seeking a second ***Machner*** hearing, alleging ineffective assistance of both trial and postconviction counsel. McCann asserted that "the jury was excused while the Court addressed probable coaching of a witness by the spectators," after it "became clear to the Court that some of the spectator[]s seated behind the prosecution were having conversations" and "shaking" and "nodding" their heads in a manner the court "properly characterized as 'trying to encourage a type of testimony.'" McCann claimed trial counsel performed deficiently because she inadequately followed up on who among the spectators was "shaking" her head, and failed to ask the court to identify any spectators "shaking

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] We infer nothing about the supreme court's view on the merits of the case from the denial of the petition. *See* ***Southern Cross, Inc. v. John***, 193 Wis. 2d 644, 648, 533 N.W.2d 188 (1995).

their heads in front of the jury" so as to permit jurors to consider it in their credibility assessment of the victim.[4] He argued that "[i]t stands to reason" that if the Court recognized that "head shaking … could be interpreted as trying to encourage a type of testimony, [the victim] did as well." McCann contended that, had counsel followed his instruction to raise the "spectator-coaching" issue, he would have proved his defense that the victim was coached to accuse him, such that there is a reasonable probability he would have been acquitted. Postconviction counsel was ineffective, he argued, for failing to challenge trial counsel's ineffectiveness and, like trial counsel, for refusing to raise the spectator-coaching issue on direct appeal.

The court denied the motion without a hearing on the basis that the record conclusively demonstrated McCann was due no relief. This appeal followed.

McCann first contends Judge Jorgenson, already having recused himself, should not have presided over the trial and postconviction hearing, and was "mandated" to inform the jury that spectators may have been attempting to coach the victim. McCann is wrong.

[4] During a break in the victim's testimony and outside the presence of the jury, the judge cautioned that it was

> hearing some giggling and some conversations, and I just ask that that stop … just no more giggling, no more laughing. The people behind the prosecutor.
>
> I know you're there to support her, but I sometimes see a head moving. You can be a friendly face for her, but just make sure you don't make any motions that she would interpret as trying to encourage a type of testimony.

After that, trial counsel asked the victim if her "grandmas" were nodding their heads during her testimony; the girl said no.

McCann filed the recusal motion in his habeas matter, Case no. 18CV69. His "belie[f]" that a substitution request granted in a separate proceeding requires a judge to recuse himself from ruling on this unrelated WIS. STAT. § 974.06 motion has no basis in law.

Further, McCann's WIS. STAT. § 974.06 motion did not raise the recusal or spectator-coaching issues. As a general rule, this court will not address issues raised for the first time on appeal. ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). And we "will not read into the §974.06 motion allegations that are not within the four corners of the motion." ***State v. Romero-Georgana***, 2014 WI 83, ¶64, 360 Wis. 2d 522, 849 N.W.2d 668. While it is within our discretion to address forfeited arguments, ***State v. Kaczmarski***, 2009 WI App 117, ¶9, 320 Wis. 2d 811, 772 N.W.2d 702, we see no compelling reason to ignore the rule here.

McCann also contends his WIS. STAT. § 974.06 motion alleging ineffective assistance of counsel was improperly denied without a ***Machner*** hearing. A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the movant to relief. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If he or she does not, or presents only conclusory allegations, or if the record conclusively demonstrates that the movant is not entitled to relief, it is within the circuit court's discretion to grant or deny a hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion on its face alleges sufficient material facts that, if true, would warrant the requested relief is a question of law we review de novo. ***Id.***

The standards governing claims of ineffective assistance of counsel have been repeated many times and need not be detailed at length here. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Suffice it to

say that a defendant must demonstrate both deficient performance and that the deficiency prejudiced the defense. ***Johnson***, 153 Wis. 2d at 127. Proving deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** (citation omitted). Demonstrating prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** (citation omitted). "A claim of ineffective assistance of counsel presents a mixed question of law and fact." ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. ***Id.***, ¶21. "This court will uphold the circuit court's findings of fact unless they are clearly erroneous." ***Id.*** Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law we review de novo. ***Id.***

"[A]ll grounds for relief under [WIS. STAT. §] 974.06 must be raised in a petitioner's original, supplemental, or amended motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Claims "finally adjudicated, waived or not raised in a prior postconviction motion … may not become the basis for a [§] 974.06 motion" unless the defendant demonstrates a sufficient reason for not asserting it earlier. Sec. 974.06(4); ***Escalona-Naranjo***, 185 Wis. 2d at 185. "[I]neffective assistance of postconviction counsel may be a sufficient reason." ***Romero-Georgana***, 360 Wis. 2d 522, ¶36. Whether the ***Escalona-Naranjo*** procedural bar applies to a postconviction claim also is a question of law. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

McCann argued that trial counsel was ineffective for failing to request that the court identify spectators he claims the court admonished for trying to "coach" the victim's testimony.[5] His asserted sufficient reason for not raising the "spectator-coaching" argument on direct appeal is that postconviction counsel ineffectively failed to point out trial counsel's error and to raise the issue himself. Both trial and postconviction counsel declined to pursue that line of argument because they believed it was without merit.

The transcript does not bear out McCann's assertions that spectators were "shaking" and "nodding" their heads, that the court's caution was to address "probable coaching" of the victim, or that the court characterized the spectators' behavior as "trying to encourage a type of testimony." Having presided over McCann's trial, the postconviction judge was well-positioned to rule on the veracity of McCann's allegations. The court found them to be "mischaracteriz[ations]," even "offensive and patently false."

Further, the court explained why it cautioned the spectators: "When a child victim is testifying about a sensitive subject like sexual assault, talking and laughing in the courtroom is disruptive," "generally not … supportive to the witness," is "distracting and could be intimidating to the victim," but "alone can not be considered witness tampering." The court also noted that the jury could consider any audible giggling and conversations if it deemed them relevant. The court's findings are not clearly erroneous.

[5] He embellishes his ineffective-assistance-of-trial-counsel claim on appeal by asserting that "[w]hen it was determined spectators were openly coaching [the victim], [t]he appropriate remedy was to order a mistrial, and not allow the behavior to continue throughout the prosecutor's direct examination of [the victim]" and, when the court did not order a mistrial, counsel should have objected. McCann provides no citation to the record where this determination supposedly was made and we have not located it.

McCann has not shown that counsel was ineffective for failing to ask the court to inform the jury that it saw "a head moving" or to identify spectators who engaged in that behavior. We agree with the State that a motion in that regard would have been denied. Trial counsel's performance thus was neither deficient nor prejudicial. *See* ***State v. Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369. Accordingly, he also has not shown that postconviction counsel was ineffective for failing to challenge trial court's performance or that his desired spectator-coaching argument was "clearly stronger" than the appellate issue counsel did raise. *See* ***id.***, ¶15. McCann thus has not proved a sufficient reason to avoid ***Escalona-Naranjo***'s procedural bar, such that the circuit court was not required to hold a ***Machner*** hearing on his claim. It was within its discretion to deny McCann's motion without one. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶30.

McCann raises two more issues. We decline, however, to revisit the matter of witness credibility or to address, for the first time, a sufficiency-of-the-evidence claim he forfeited by not raising it on direct appeal, without giving any, let alone a sufficient, reason for failing to do so.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is 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