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DISTRICT I

December 1, 2020

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

2019AP1252 State of Wisconsin v. James Earl Norwood (L.C. # 2015CF3397)

Before Blanchard, Dugan and White, 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).

James Earl Norwood, *pro se*, appeals an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2017-18).[1] He alleges that: (1) in proceedings following his conviction for second-degree sexual assault, his postconviction counsel was ineffective for

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

failing to raise claims related to DNA evidence, specifically, DNA test results that were not presented at trial; (2) the DNA test results are newly-discovered evidence requiring a new trial; and (3) he should be granted a new trial in the interest of justice in light of the DNA test results. Upon review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

According to the criminal complaint, P.J.J. called the police early in the morning of July 29, 2015, and reported that her former boyfriend, Norwood, was in her home. She said that he had arrived uninvited, she allowed him in, and he asked for sex. She said that, despite her refusal, he inserted his penis into her vagina and restrained her by holding his arm around her neck. P.J.J. went on to tell police that when Norwood lost his erection, she was able to persuade him to allow her to use the bathroom. She then locked herself in another bedroom with her sister, and they called 911. Police who responded to the call found Norwood asleep in P.J.J.'s bed. They arrested him.

Later that day, a nurse examined P.J.J. at the Sexual Assault Treatment Center. During the course of the examination, the nurse swabbed and wiped P.J.J.'s body for DNA evidence, collecting samples from her vagina, cervix, and neck, among other areas.

Norwood gave a recorded custodial statement to police on July 30, 2015. He admitted that he had sexual intercourse with P.J.J. the previous day, but he said that the sex was consensual and that he did not ejaculate. He also provided a DNA sample for forensic analysis.

The State charged Norwood with second-degree sexual assault and strangulation. He pled not guilty and demanded a speedy trial. In pretrial proceedings in September 2015, the State advised that it had not yet received any results from a DNA analysis, but the parties agreed

to keep a November 4, 2015 trial date nonetheless. At the final pretrial conference in October 2015, the State reported that it had turned over "all the discovery that exists," but the requested DNA analysis had not yet been conducted. The State added that it would disclose the DNA test results if they were available, but it did not intend to wait for them because "this is a consent case," and the State therefore did not believe the DNA test results would be relevant. Defense counsel concurred, explaining that Norwood admitted to having sex with P.J.J., so "the real issue is consent," and therefore "DNA evidence would not be very helpful."[2]

The jury trial began as scheduled on November 4, 2015. P.J.J. testified about the assault, and the jury heard testimony from a trauma center nurse about P.J.J's subsequent physical examination. A police officer testified about Norwood's recorded custodial statement in which Norwood admitted that he had sexual intercourse with P.J.J. on July 29, 2015. The State also played portions of Norwood's recorded statement for the jury. No DNA evidence was presented. Norwood elected not to testify.

The jury found Norwood guilty of second-degree sexual assault but acquitted him of strangulation. Thereafter, Norwood discharged his trial counsel, and successor trial counsel represented him at his March 15, 2016 sentencing. During that proceeding, Norwood told the circuit court that the DNA evidence showed he was innocent of sexual assault, but "somehow the DNA did not get entered in this case."

[2] All parties were aware of Norwood's planned defense as a consequence of the State's motion to admit evidence of Norwood's prior convictions in Illinois for aggravated criminal sexual assault involving use of force and choking. Following a hearing, the circuit court excluded the proposed evidence as irrelevant, relying substantially on the disclosure that Norwood's defense in the instant case was consent and the accompanying analysis that "[t]he fact that one woman was raped has no tendency to prove that another woman did not consent."

Norwood pursued a direct appeal in this court with the assistance of new counsel. In that proceeding, he raised a claim that the circuit court improperly denied his motion to admit other act evidence, namely, that P.J.J. had falsely alleged in a paternity suit that he was the father of her child. We affirmed. *See* ***State v. Norwood*** (***Norwood I***), No. 2018AP869-CR, unpublished slip op. (WI App Jan. 8, 2019).

Norwood next filed the postconviction motion underlying this appeal. As relevant here, he alleged that he had newly discovered exculpatory DNA test results warranting a new trial; the State failed to produce exculpatory DNA test results in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963); his trial counsel was ineffective for failing to raise the alleged discovery violation or to present the DNA evidence, and his postconviction counsel was ineffective in turn for failing to challenge trial counsel's effectiveness.[3] In support of his claims, he submitted a portion of a Milwaukee Crime Laboratory report reflecting DNA test results. The report was initialed by an analyst and dated November 3, 2015, the day before the start of Norwood's trial. The excerpted portion reflects that "DNA from at least three individuals was detected" from the sperm fraction on P.J.J.'s vaginal and cervical swabs and on a gauze pad cutting. Norwood was "excluded as a possible contributor to the major mixture component of the STR DNA mixture profile detected from" those items, and P.J.J. was included.[4] The excerpt goes on to say that "[t]he minor

[3] Norwood also claimed that he suffered a violation of his due process rights because the circuit court used WIS JI—CRIMINAL 140 to instruct the jury in regard to the State's burden of proof. The circuit court denied the claim, explaining that the supreme court had disposed of the issue in ***State v. Trammell***, 2019 WI 59, ¶26, 387 Wis. 2d 156, 928 N.W.2d 564 (holding that the instruction "does not unconstitutionally reduce the State's burden of proof"). Norwood does not renew the jury instruction claim in his appellate briefs. We deem the issue abandoned and do not discuss it further. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos***., 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

[4] Short-tandem-repeat (STR) DNA testing is a highly discriminating form of DNA testing. *See* ***District Attorney's Office v. Osborne***, 557 U.S. 52, 60 & n.3 (2009).

component of the STR DNA mixture profile" from the two swabs "does not support any comparisons to other STR DNA profiles due to the limited amount of genetic information available."[5] Finally, the document reflects that P.J.J. and Norwood were both included "as possible contributors to the major mixture component of the STR DNA mixture profile detected from [P.J.J.'s] neck swabs."

In addition to submitting the laboratory report excerpt, Norwood supported his postconviction motion with a letter from his successor trial counsel conveying a copy of the DNA test results to Norwood and advising him that the public defender's office would appoint postconviction counsel for him. The letter is dated March 21, 2016, a few days after his sentencing hearing.

The circuit court rejected Norwood's DNA-related claims as insufficiently pled. Norwood appeals.

Pursuant to WIS. STAT. § 974.06, a convicted person such as Norwood may raise constitutional and jurisdictional claims in a postconviction motion after the time for an appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶¶52-53, 328 Wis. 2d 544, 787 N.W.2d 350. There is, however, a limitation, because "[w]e need finality in our litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Accordingly, serial

[5] The portion of the laboratory report that Norwood submitted with his postconviction motion does not include information about the minor component of the DNA mixture on the gauze pad. He submitted additional portions of the report in the appendix to his appellate brief. We do not normally consider materials included only in an appendix. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989). In any case, we observe that the materials included in Norwood's appendix purport to reflect that the gauze pad, like the swabs, contained too little genetic information from the minor contributor to permit comparison to other DNA profiles.

postconviction proceedings are barred unless the convicted person offers a sufficient reason that the claims presented in those proceedings were not previously raised in a prior postconviction motion or appeal. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶35, 360 Wis. 2d 522, 849 N.W.2d 668. Whether a person has alleged a sufficient reason to avoid the procedural bar imposed by § 974.06 is a question of law that we review *de novo*. *See* ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920. We assess the sufficiency of Norwood's reason by examining the four corners of his postconviction motion, not his appellate briefs. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

Here, Norwood asserted that he had a sufficient reason for not raising a newly discovered evidence claim in the proceedings underlying ***Norwood I*** because, he said, "a sufficient reason is shown when the legal basis for a claim did not exist until after the defendant's prior efforts at post-conviction relief." We do not take issue with the proposition that a basis for relief that arose only after a defendant litigated a postconviction claim may constitute a sufficient reason for additional postconviction litigation. The record shows, however, that the DNA test results Norwood offered as "newly discovered evidence" existed before his sentencing and were provided to him before he commenced any postconviction proceedings. Norwood's proposed reason for belatedly raising his newly discovered evidence claim is therefore insufficient here. Accordingly, the claim is barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 186.

As to the remaining claims—that the State failed to produce the DNA evidence before trial and that trial counsel was ineffective for failing to uncover and present that evidence—Norwood alleged ineffective assistance of his postconviction counsel as the reason he failed to raise those claims previously. Ineffective assistance of postconviction counsel for failing to raise issues so as to preserve them for appeal may constitute a sufficient reason to overcome the

procedural bar imposed by WIS. STAT. § 974.06.[6] *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

To demonstrate that postconviction counsel was ineffective, a defendant must satisfy a familiar two-prong test by showing that counsel performed deficiently and that the deficiency prejudiced the defense. *See* ***State v. Balliette***, 2011 WI 79, ¶¶21, 63, 336 Wis. 2d 358, 805 N.W.2d 334. To prove deficiency, a defendant must identify specific acts or omissions by counsel that "fell below an objective standard of reasonableness." *See* ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). Additionally, when a defendant alleges that postconviction counsel was ineffective for failing to bring a claim that should have been brought, proof of deficiency requires a showing that the ignored claim was "clearly stronger" than the claims counsel actually raised. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶43-46; *see also* ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." (Citation omitted.)). As to proof of 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

[6] The State suggests in its respondent's brief that, because Norwood's direct appeal was not preceded by a postconviction motion, Norwood currently alleges ineffective assistance of appellate counsel, a claim that must be raised in a petition for a writ of habeas corpus filed in the court of appeals pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). In support, the State cites ***State v. Starks***, 2013 WI 69, ¶4, 349 Wis. 2d 274, 833 N.W.2d 146. After briefing in this case was completed, our supreme court abrogated the portion of ***Starks*** on which the State relies. *See* ***State ex rel. Warren v. Meisner***, 2020 WI 55, ¶5, 392 Wis. 2d 1, 944 N.W.2d 588. As ***Warren*** clarifies, allegations of ineffective assistance of counsel should be brought in the forum where the allegedly ineffective conduct occurred. *See* ***id.*** Norwood correctly followed that procedure.

Both deficiency and prejudice are questions of law for our *de novo* review. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). We may consider either deficiency or prejudice first, and if one is unproven, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

In this case, we need address only the deficiency prong of the analysis. To satisfy that prong, Norwood was required to show, within the four corners of his postconviction motion, that his claims in regard to the allegedly belated disclosure of DNA test results were clearly stronger than the challenge to the exclusion of other act evidence that his appellate counsel pursued on his behalf in ***Norwood I***. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶58; *see also* ***Allen***, 274 Wis. 2d 568, ¶¶23, 27. Our supreme court has provided a road map for defendants to follow in circumstances such as these. Specifically, the defendant must allege "sufficient material facts—e.g., who, what, where, when, why, and how—that, if true would entitle him to the relief he seeks." ***Romero-Georgana***, 360 Wis. 2d 522, ¶58 (citation omitted). Norwood, however, did not offer any explanation in his postconviction motion as to why, or how, or in what way the claims he raised in that motion were clearly stronger than the claim that appellate counsel pursued. Indeed, as the State accurately points out, Norwood's postconviction motion did not mention the claim pursued in ***Norwood I***, let alone compare the merits of that claim to the merits of the claims raised in his postconviction motion. Accordingly, the claims related to belated

production of DNA test results and trial counsel's alleged ineffectiveness in pursuing that evidence are barred.[7] *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶58.

We turn to Norwood's claim for discretionary reversal in the interest of justice pursuant to WIS. STAT. § 752.35. This court may order a new trial under that statute when the real controversy has not been fully tried or when it is probable that justice has miscarried. *See* ***id.*** We exercise our power of discretionary reversal in only the most exceptional of cases. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis.2d 256, 720 N.W.2d 469.

We may conclude that a case was not fully tried "when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). We may conclude that "justice has miscarried if there is a substantial probability that a new trial would produce a different result.'" *See* ***State v. Kucharski***, 2015 WI 64. ¶5, 363 Wis. 2d 658, 866 N.W.2d 697 (citation omitted). Norwood fails to show that the instant case meets either of these standards.

Norwood suggests that the DNA test results would have allowed him to demonstrate that "P.J.J.'s allegations [of] sexual intercourse cannot be true." That claim, however, was not "an important issue of the case." *See* ***Hicks***, 202 Wis. 2d at 160. To the contrary, Norwood admitted sexual intercourse when he was arrested, and he did not recant that admission on the record at

[7] Norwood's appellate brief includes some discussion of the claim pursued by appellate counsel in ***State v. Norwood*** (***Norwood I***), No.2018AP869-CR, unpublished slip op. (WI App Jan. 8, 2019). This discussion comes too late. We examine only the postconviction motion to determine its sufficiency. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

any time before his conviction.[8] The disputed question at trial was whether P.J.J. consented to sexual intercourse with Norwood on July 29, 2015.

Further, the DNA evidence does not refute P.J.J.'s allegations. The DNA evidence shows that Norwood was the major contributor to the DNA profile mixture found on P.J.J.'s neck, thus supporting P.J.J.'s claim that he had intimate contact with her; and while the test results exclude him as a major contributor to the DNA found elsewhere on her body, they do not exclude him as a minor contributor.[9] Given the nature of the case and the evidence presented, including Norwood's admission to police that he had sexual intercourse with P.J.J. on July 29, 2015, we are satisfied that no reasonable probability exists that the DNA evidence would have led the jury to acquit Norwood of sexual assault. Accordingly, we reject Norwood's suggestion that this is the rare case requiring a new trial in the interest of justice. We affirm.

IT IS ORDERED that the postconviction order is summarily affirmed. *See* 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

[8] Norwood appears to use his appellate briefs as a forum for recanting his admission to sexual intercourse with P.J.J. on July 29, 2015. As we have seen, Norwood previously relied on his admission to shield himself from the potential introduction at trial of evidence that he had prior convictions for sexual assault and strangulation.

[9] In the reply brief, Norwood points out that the jury acquitted him of strangulation even though he was a source of the DNA found on P.J.J.'s neck, and from this he argues that the jury would have acquitted him of sexual assault if it understood that he was not the major source of DNA found in P.J.J.'s vagina and cervix. Norwood is confused. The jury did not hear any DNA evidence. Therefore, the jury could not have considered DNA evidence in reaching a verdict on the strangulation charge.