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DISTRICT I

September 8, 2021

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

2019AP2087-CR State of Wisconsin v. Jason Romar Small (L.C. # 2016CF4618)

Before Brash, C.J., 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).

Jason Romar Small appeals a judgment of conviction and an order denying postconviction relief. Small argues that he was entitled to a hearing on his postconviction claim that his trial counsel was ineffective for not adequately preparing him for cross-examination. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Based upon our

review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[1] We summarily affirm.

Following a jury trial, Small was convicted of first-degree intentional homicide, hiding a corpse, and possession of a firearm by a felon. The trial court sentenced him to life in prison without eligibility for release on extended supervision.

Small subsequently filed a postconviction motion and supporting affidavit alleging that his trial counsel was ineffective for failing to explain his trial defense to him and for not preparing him to testify. Small averred: "My answers to the prosecutor's questions on cross-examination ended up destroying my defense." The circuit court denied the motion without an evidentiary hearing, and this appeal follows.

Our analysis of an ineffective assistance of counsel claim involves the familiar two-pronged test: the defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citations and one set of quotation marks omitted).

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The court "need not address both components of this inquiry if the defendant does not make a sufficient showing on one." ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854. "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

Small seeks a ***Machner*** hearing for his ineffective assistance of counsel claim. *See* ***Machner***, 92 Wis. 2d at 804. However, a defendant is not automatically entitled to an evidentiary hearing relating to his or her postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Rather, the trial court is required to hold an evidentiary hearing only if the defendant has alleged "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. If, on the other hand, the postconviction 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," the trial court, in its discretion, may either grant or deny a hearing. ***Id.***, ¶9.

On appeal, Small reiterates his postconviction claims that his trial counsel was ineffective because he did not properly explain the theory of the case to Small so that Small understood it. Small suggests that if he had been better prepared to testify in support of his defense, "there was a better than negligible chance" the trial court would have granted the request for an instruction on second-degree reckless homicide. According to Small, trial counsel's advice on the decision to testify was crucial and trial counsel's failure in this regard, which went to the core of his defense, resulted in prejudice.

Small does not explain how trial counsel should have better prepared him for his testimony or for the State's cross-examination. Small testified on cross-examination that he shot the victim three times because he was afraid the victim was about to report him to the police. Small denied that he intended to kill the victim and, instead, claimed he shot recklessly as the victim walked away because he was high on marijuana and scared. Small does not claim that his answers to the prosecutor's questions on cross-examination were untrue or explain how his testimony would have differed had trial counsel better prepared him.[2]

Small additionally fails to develop any argument as to how better preparation for cross-examination would have made a difference in the outcome other than speculating that it might have prompted the jury to find him guilty of a lesser included offense. Speculation, however, is insufficient to satisfy the prejudice prong of ***Strickland***. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). Small failed to allege sufficient facts to support his claim of prejudice and relies only on conclusory allegations; therefore, his argument fails.[3] The trial court properly denied his postconviction motion without a hearing.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

[2] In his reply brief, Small made it clear that he is not claiming that trial counsel was ineffective for advising him to take the stand in his own defense.

[3] In what appears to be an argument made for the first time in his reply brief, Small contends that the Seventh Circuit's rule that "prejudice has been established so long as the chances of acquittal are better than negligible" is the standard to apply here. *See* ***Harris v. Thompson***, 698 F.3d 609, 644-45 (7th Cir. 2012) (citation omitted). Even applying this rule, Small's prejudice argument fails.

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

Sheila T. Reiff
Clerk of Court of Appeals