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**DISTRICT IV**

November 4, 2021

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Stanley, WI 54768

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

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2020AP512

State of Wisconsin v. Roy A. Salenius (L.C. # 2011CF473)

Before Kloppenburg, Fitzpatrick, and Graham, 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).**

Roy Salenius, pro se, appeals a circuit court order that denied Salenius's WIS. STAT. § 974.06 (2019-20)<sup>1</sup> postconviction motion. Salenius contends that he was denied the effective assistance of counsel at trial. 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. We summarily affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Salenius was convicted, following a jury trial, of repeated sexual assault of a child. Salenius pursued postconviction claims of ineffective assistance of counsel, and this court affirmed on appeal. *State v. Salenius*, No. 2016AP277-CR, unpublished slip op. (WI App Feb. 16, 2017). Salenius then sought relief under WIS. STAT. § 974.06, asserting multiple claims of ineffective assistance of trial counsel and ineffective assistance of postconviction counsel for failing to pursue those claims. The circuit court held a motion hearing on whether postconviction counsel was ineffective, at which postconviction counsel testified. The court then denied the motion. It found that the majority of Salenius’s claims of ineffective assistance of trial counsel were already litigated in Salenius’s direct postconviction motion and appeal. Additionally, the court specifically addressed and rejected Salenius’s claim of ineffective assistance of trial counsel related to trial evidence that lab test results indicated that saliva was recovered from the victim’s underwear.

A defendant may not raise claims under WIS. STAT. § 974.06 if the defendant could have raised those claims in a previous postconviction motion or appeal, unless the defendant has a “sufficient reason” for failing to do so. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). A claim brought under § 974.06 is also barred if it was finally adjudicated in a prior postconviction proceeding. *Id.*

If a postconviction motion, on its face, alleges facts that would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). However, if the defendant fails to allege sufficient facts in the motion or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to deny the postconviction motion without a hearing. *Id.* at 310-11. When, as here, a defendant is claiming

ineffective assistance of counsel, the defendant must set forth sufficient facts to show that counsel was deficient and that the deficiency prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. *Id.* at 697.

Salenius asserts that his trial counsel was ineffective by: (1) failing to investigate the test results for saliva on the exterior of the underwear that the victim reported she was wearing on the date of one of the sexual assaults; and (2) failing to present evidence that the underwear was not provided to investigators until four days after the initial investigation.<sup>2</sup> The State responds that Salenius failed to establish a sufficient reason to overcome the procedural bar to raising those claims following his direct postconviction motion and appeal. It also argues that Salenius has not established that his trial counsel was ineffective. We conclude that Salenius has failed to establish that any claimed error by his trial counsel prejudiced the defense. Because we reject Salenius's claims of ineffective assistance of counsel on the merits, we decline to address the State's arguments as to the procedural bar.

Salenius contends first that his trial counsel was ineffective by failing to investigate the results of a test for saliva that was conducted on the exterior of the victim's underwear. He contends that his counsel was ineffective by failing to challenge the State's evidence that

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<sup>2</sup> Salenius raised twenty-one claims of ineffective assistance of counsel in his WIS. STAT. § 974.06 motion, but has briefed only two of those claims on appeal. Salenius asserts that he was unable to brief the other nineteen issues because this court denied Salenius's motion to file an oversized brief. He asserts that he has not abandoned any of his issues, and that he has placed his arguments as to the other nineteen issues in the appendix to his brief. However, this court does not consider arguments from an appendix to an appellant's brief. We consider only the arguments set forth in the appellant's brief.

amylase, a protein found in saliva, was identified on the exterior of the underwear that the victim reported that she was wearing on the date of one of the sexual assaults. Salenius contends that, contrary to the evidence at trial, a picture of the instrument used for the test for saliva indicates a negative result. Salenius argues that his trial counsel performed deficiently by conceding that his saliva was found on the underwear.<sup>3</sup> He argues that he was prejudiced by counsel's failure to investigate and challenge the saliva evidence, because the physical evidence was central to the State's case. He cites the State's closing argument that the victim's allegation that Salenius put his mouth on her vagina was confirmed by the DNA and saliva recovered from the victim's underwear. We are not persuaded.

At Salenius's trial, the State presented testimony by an analyst that Salenius's DNA was recovered from the exterior of the victim's underwear. The analyst testified that, in addition, testing of a section of the exterior of the underwear was positive for amylase, indicating the presence of saliva, but that the analyst was unable to identify the source of the saliva. For purposes of this opinion, we will assume without deciding that Salenius has identified a basis on which trial counsel could have challenged the analyst's testimony that saliva was recovered from

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<sup>3</sup> Salenius also contends that his trial counsel performed deficiently by stating in closing arguments that "we have to take her word for how [Salenius's] DNA got on the outside of the underwear," which he argues conceded the victim's allegation that Salenius placed his mouth on the victim's vagina. However, in closing arguments, trial counsel argued that the presence of Salenius's DNA on the underwear was not indicative of a sexual assault. Trial counsel argued that, because Salenius and the victim lived in the same house and the underwear had been "unaccounted for for twelve days" after the alleged sexual assault, there were many ways that Salenius's DNA could have gotten on the underwear. As part of that argument, trial counsel stated: "We have to take [the victim] at her word as to what happened with the underwear because there's nobody else who knows. And we have to take her word for how [Salenius's] DNA got on the outside of the underwear." Counsel then went on to argue the various ways that Salenius's DNA could have been deposited on the underwear rather than a sexual assault, and argued that no sexual assault occurred. Thus, in context, counsel did not concede that a sexual assault occurred.

the exterior of the victim's underwear. However, even if trial counsel had established that no saliva was recovered from the underwear, the jury still would have heard that Salenius's DNA was recovered from the underwear. Moreover, the analyst did not testify that the saliva was from Salenius, but rather that the source of the saliva had not been determined, and the victim testified that Salenius took her underwear off before he placed his mouth on her vagina. The jury also heard the rest of the victim's detailed testimony as to the sexual assaults. In light of the evidence presented at trial, we conclude that Salenius has not established a reasonable probability that, had trial counsel established that there was no saliva recovered from the exterior of the victim's underwear, the results of the proceeding would have been different.<sup>4</sup> Accordingly, Salenius has not established that trial counsel's error, if any, prejudiced the defense. *See State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (to establish 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." (quoted source omitted)).

Next, Salenius contends that his trial counsel was ineffective by failing to introduce evidence that the victim's mother did not provide the victim's underwear to the police until four days after the initial police investigation of the sexual assaults. He contends that the police reports indicate that the victim's mother gave the victim's underwear to police during an interview four days after police completed their investigation and collection of physical evidence

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<sup>4</sup> While the prosecutor argued in closing arguments that both the DNA evidence and the saliva evidence confirmed the victim's allegation that Salenius put his mouth on her vagina, the jury was instructed that closing arguments are not evidence. Additionally, Salenius cites the sentencing court's comments that the evidence at trial indicated that Salenius's saliva was found on the exterior of the victim's underwear, and that the saliva evidence was probably a strong consideration for the jury. However, this court is not bound by the sentencing court's opinion as to the trial evidence.

at the victim's house. He argues that his trial counsel performed deficiently by failing to introduce evidence that the victim's underwear was not given to police until four days after the victim told a social worker that she did not know what underwear she had been wearing and that her underwear would have already gone through the wash.<sup>5</sup> He argues that, had his counsel introduced evidence that the victim's underwear was not given to police until four days after police searched the house for physical evidence, the jury would have deemed the underwear evidence irrelevant, and would not have found him guilty. We are not persuaded.

The evidence at trial established that the underwear that the victim claimed she was wearing at the time of one of the sexual assaults had been lying under a chair for twelve days, in the home shared by Salenius and the victim. Thus, the jury was aware that there was a lapse in time between the alleged sexual assault and when the underwear was provided to police. We are

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<sup>5</sup> In Salenius's direct postconviction motion, his postconviction counsel argued that his trial counsel was ineffective by failing to introduce evidence of the victim's statement to the social worker that she did not know what underwear she had been wearing on the date of the specified sexual assault, and that her clothes had gone through the wash. Counsel asserted that police reports indicated that the underwear was provided to police by the victim's mother; that the victim testified at trial that she gave her mother the underwear the day before her mother provided the underwear to police; and that the victim's interview with the social worker occurred the same day the underwear was provided to police. Thus, counsel argued, trial counsel was ineffective by failing to impeach the victim with her prior inconsistent statement that, the day after she claimed to have turned the underwear over to her mother, she had told the social worker that she did not know what underwear she was wearing and that her clothes had been washed. The circuit court rejected that argument. It found that, at the postconviction motion hearing, trial counsel had explained a reasonable trial strategy of arguing that no sexual assault occurred, not whether the "right" underwear was recovered, and also that the victim's inconsistent statements about the underwear would not have changed the outcome of the trial. The State argues that Salenius's current argument as to the chain of custody of the underwear is a variation of the argument already raised and therefore barred by *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). For purposes of this opinion, we assume without deciding that Salenius has identified a new issue not previously litigated. However, we limit our discussion to the only arguably new issue raised by Salenius in this postconviction motion, that is, that trial counsel was ineffective by failing to introduce evidence that four days had elapsed from the search for evidence at the victim's home and the date the victim's mother provided the underwear to police.

not persuaded that there is a reasonable probability that the outcome would have been different if, in addition, the jury had been told that four more days had elapsed from the initial police investigation until the underwear was provided to police. Accordingly, Salenius has failed to establish prejudice. *See Thiel*, 264 Wis. 2d 571, ¶20.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*