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DISTRICT I

January 11, 2022

To:

Hon. Jeffrey A. Conen
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

Hon. Joseph R. Wall
Circuit Court Judge
Electronic Notice

Carl W. Chesshir
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

John D. Flynn
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You are hereby notified that the Court has entered the following opinion and order:

2020AP193-CR

State of Wisconsin v. Michael Dale Blair (L.C. # 2017CF481)

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).

Michael Dale Blair appeals from a judgment, entered on a jury's verdicts, convicting him of two counts of second-degree sexual assault, one count of human trafficking, and three drug offenses. Blair also appeals from an order denying his postconviction motion for a new 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 (2019-20).¹ The judgment and order are summarily affirmed.

After the jury convicted Blair and the trial court² imposed sentences totaling thirty-five years' imprisonment, Blair filed a postconviction motion seeking a new trial. He alleged that trial counsel had been ineffective for not calling two witnesses at trial, Steven Sell and Tina Fabre, to corroborate his defense, which was that assault victim K.S. and her boyfriend had fabricated the allegations against him so that they could burglarize his apartment while he was in custody. According to affidavits attached to the postconviction motion, Sell had gone to check on Blair's apartment shortly after his arrest and noticed items missing from the apartment. After K.S. started staying at Blair's apartment, her boyfriend began asking Fabre—an acquaintance of Blair and former neighbor of K.S.—for information about Blair, like his address and phone number, so that he could get K.S. “away from that old man.”

The circuit court denied the motion without a hearing, finding that Blair's “allegation that counsel was deficient for failing to call these witnesses is conclusory and fails to set forth sufficient material facts.” Specifically, Blair had not alleged that trial counsel “knew or had reason to know about these witnesses or the testimony they would offer at trial.” The circuit court also concluded that Blair had failed to adequately plead facts showing prejudice, finding that Fabre's information bordered on irrelevant and that Sell's testimony would have been

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

² The Honorable Jeffrey A. Conen presided at trial and imposed sentence and will be referred to as the trial court. The Honorable Joseph R. Wall reviewed the postconviction motion and will be referred to as the circuit court.

cumulative because Blair himself had testified that his apartment had been burglarized. Blair appeals.

“A hearing on a postconviction motion is required only when the movant states 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. Whether the motion alleges sufficient material facts is a question of law we review *de novo*. See *id.*, ¶9. If the motion does not raise sufficient facts, or if the motion presents only conclusory allegations, then the decision whether to grant a hearing is committed to the circuit court’s discretion. See *id.* We review such a decision for an erroneous exercise of discretion. See *id.*

To demonstrate ineffective assistance of counsel, “the defendant must prove (1) that trial counsel’s performance was deficient; and (2) that this deficiency prejudiced the defendant.” See *State v. Dillard*, 2014 WI 123, ¶85, 358 Wis. 2d 543, 859 N.W.2d 44. The movant must prevail on both prongs to secure relief. See *Allen*, 274 Wis. 2d 568, ¶26.

To demonstrate deficient performance, Blair must show facts from which we can conclude that trial counsel’s representation fell below objective standards of reasonableness. See *State v. McDougle*, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. The “reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” See *Strickland v. Washington*, 466 U.S. 668, 691 (1984). “This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel.” *State v. Nielsen*, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325.

As the circuit court noted, Blair made no allegations within the postconviction motion that trial counsel knew or had reason to know about Sell and Fabre and the testimony they supposedly could have provided. On appeal, Blair does not dispute the circuit court's conclusion that his motion was insufficiently pled. Rather, he complains that the circuit court "fails to point to any evidence that trial counsel did not know of these witnesses and/or what investigation into Blair's defense was made by trial counsel to determine what witnesses might be necessary to support Blair's defense."³ However, this argument utterly ignores the fact that the pleading requirements set forth in *Allen* place the burden on the movant to allege "sufficient material facts that, if true, would entitle the defendant to relief." *See id.*, 274 Wis. 2d 568, ¶14.

We agree with the circuit court that Blair has not alleged sufficient material facts to show deficient performance by trial counsel. Because Blair has not shown deficient performance, we need not consider prejudice. Thus, we conclude that the circuit court did not erroneously exercise its discretion in denying Blair's postconviction motion without a hearing.

IT IS ORDERED that the judgment and order are 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

³ Blair also asserts that he is not required to "prove his innocence." On appeal, however, "the defendant is no longer protected by the presumption of innocence." *See State v. Allen*, 2010 WI 89, ¶17, 328 Wis. 2d 1, 786 N.W.2d 124.