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DISTRICT I

September 20, 2022

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Hon. Glenn H. Yamahiro
Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2021AP2132-CR State of Wisconsin v. Isidro W. Guerra-Dominguez (L.C. # 2018CF1558)

Before Donald, P.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).

Isidro W. Guerra-Dominguez appeals a judgment of conviction, following a jury trial, of three counts of first-degree child sexual assault. Guerra-Dominguez also appeals from the order denying his postconviction motion for relief. Upon our review of the briefs and record, we

conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We summarily affirm.

Guerra-Dominguez was charged with three counts of first-degree sexual assault of a child. The charges stemmed from allegations that Guerra-Dominguez assaulted his stepdaughter three times, starting when she was eight and continuing until she was twelve. The matter proceeded to trial.

During opening statements, trial counsel suggested that the victim may have had motive to fabricate her testimony about the allegations and that the defendant lacked the opportunity to commit one or more of the offenses. During trial, the State presented the victim's testimony and recorded statement, testimony from a Sexual Assault Nurse Examiner (SANE), a disclosure expert, and the victim's mother. There was no DNA or other physical evidence. The defense's evidence consisted of testimony from Guerra-Dominguez, which contradicted his theory of defense. Specifically, Guerra-Dominguez testified that he could not think of a reason for the victim fabricating the allegations and that he spent plenty of alone time with the victim, as he was her stepfather.

The jury found Guerra-Dominguez guilty and the trial court sentenced him to a total of twenty-five years of initial confinement, followed by ten years of extended supervision. Guerra-Dominguez filed a postconviction motion for a new trial, arguing that trial counsel was deficient in pursing a defense contradictory to the evidence and that the error permeated the entire trial to the point where prejudice can be presumed. The postconviction court denied the motion without

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

a hearing, finding Guerra-Dominguez's allegations conclusory. The postconviction court also noted that Guerra-Dominguez failed to present any meaningful discussion about alternative defense theories and could not demonstrate prejudice. This appeal follows.

On appeal, Guerra-Dominguez contends that the postconviction court erred in finding his arguments conclusory because his postconviction motion sufficiently pled counsel's ineffectiveness. Guerra-Dominguez effectively makes the same arguments he raised in his postconviction motion—that counsel selected a theory of defense that counsel knew or should have known would have been defeated by his trial testimony. Guerra-Dominguez contends that counsel's strategy selection was so egregious that it tainted the entire trial and we must assume prejudice. We disagree.

To prove ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Furthermore, a claim of ineffective assistance requires that a postconviction evidentiary hearing be held "to preserve the testimony of trial counsel." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

However, a defendant is not automatically entitled to a ***Machner*** hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Rather, the postconviction 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, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This is a question of law that we review *de novo*. *See* ***id.***

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 postconviction court, in its discretion, may either grant or deny a hearing. ***Id.*** We will uphold such a discretionary decision if the postconviction court "has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." *See* ***Bentley***, 201 Wis. 2d at 318.

We agree with the postconviction court that Guerra-Dominguez's postconviction motion fails to allege "the five 'w's' and one 'h'" that are indicative of a sufficiently pled motion. *See* ***Allen***, 274 Wis. 2d 568, ¶23. Guerra-Dominguez faults trial counsel for choosing a strategy that was "destined to fail," but neither explains how counsel would have known that, nor provides any alternative theories of defense. Instead, without pointing to any evidence in the record that would lend credence to his argument, Guerra-Dominguez simply contends that counsel's strategy was so unreasonable that we must presume prejudice.

In rare instances, we presume that counsel's deficient performance is prejudicial. *See* ***State v. Erickson***, 227 Wis. 2d 758, 770, 596 N.W.2d 749 (1999). Our supreme court has identified three categories of such instances:

> (1) "when the effective assistance of counsel has been eviscerated by forces unrelated to the actual performance of the defendant's attorney," such as when counsel is denied entirely during critical stages in judicial proceedings; (2) when the circumstances are such that even a competent attorney could not provide effective assistance, such as when the [S]tate or the court interferes with counsel's representation; and (3) when the attorney engages in egregious conduct far outside the bounds of effective assistance such as providing representation under a conflict of interest or failing to present known evidence that calls into question the defendant's competency to stand trial.

State v. Pinno, 2014 WI 74, ¶83, 356 Wis. 2d 106, 850 N.W.2d 207 (quoting ***Erickson***, 227 Wis. 2d at 769-71).

Guerra-Dominguez's allegation against counsel does not fall into any of these categories. Moreover, he alleges no material facts to support the presumption of prejudice. Indeed, the record undercuts Guerra-Dominguez's argument as it shows that he, himself, confirmed that he had enough time to speak with counsel about his testimony and that counsel was confident that Guerra-Dominguez understood the implications of his decision to testify.

For the foregoing reasons, we affirm the judgment of conviction and the order denying Guerra-Dominguez's postconviction motion.

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