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September 27, 2022

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

2021AP345-CR

State of Wisconsin v. Jamell A. Sanford (L.C. # 2017CF1477)

Before Brash, C.J., Donald, P.J., and White, J.

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).

Jamell A. Sanford, *pro se*, appeals a judgment of conviction entered after a jury found him guilty of first-degree sexual assault by use of a dangerous weapon, armed robbery, and kidnapping. He also appeals orders denying his motion for postconviction relief and his motion for reconsideration of the adverse postconviction order. Based upon 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 affirm.

B.S.M. testified at trial that late on the night of January 25, 2017, a man she did not know forced her into an alley at gun point, sexually assaulted her, and then took the money in her wallet. A nurse testified that she examined B.S.M. early the next morning and collected physical evidence from B.S.M., including swabs from her *mons pubis* and genitalia.

A DNA analyst, Emily Schmitt, testified as an expert witness for the State. She said that J.H.—previously identified as B.S.M.’s boyfriend—was the source of the male genetic material found on the swabs of B.S.M.’s external genitalia. Schmitt also testified that genetic material swabbed from B.S.M.’s *mons pubis* revealed a mixture of two contributors: B.S.M., who was the major contributor; and a male person, who was the minor contributor. Schmitt told the jury that J.H. was excluded as the male contributor to the *mons pubis* swab. Schmitt then explained that the male’s genetic material collected on the *mons pubis* swab was not from sperm but, beyond that exclusion, the analyst could not identify whether the material was from tissue, hair, saliva, or some other biological detritus. Schmitt went on to testify that she subsequently compared Sanford’s DNA profile to that of the male whose genetic material was on the *mons pubis* swab. According to Schmitt, the probability that Sanford was the minor contributor to the non-sperm genetic material found on the *mons pubis* swab was one in 529 quadrillion (529,000,000,000,000,000), a number that exceeded the population of the planet many times over and was therefore sufficiently large as to permit her to state that Sanford was the source.

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

Sanford, by counsel, mounted a defense that his DNA was on B.S.M. as a result of a secondary transfer, such as through use of one of the public restrooms that B.S.M. testified she had probably used on January 25, 2017. The jury, however, found Sanford guilty as charged of first-degree sexual assault by use of a dangerous weapon, armed robbery, and kidnapping.

Following sentencing, the State Public Defender appointed postconviction and appellate counsel to represent Sanford. At Sanford's request, appointed counsel moved to withdraw and Sanford confirmed in writing that he wanted the circuit court to grant that motion so that he could proceed *pro se*. The circuit court granted the motion and discharged Sanford's appointed counsel. Meanwhile, this court established March 6, 2020, as the deadline for Sanford to file a motion for postconviction relief.

On February 25, 2020, Sanford filed a document titled: "Defendant's Pro se Post-Conviction Motion."² The motion raised a variety of claims for relief, but all of the allegations of trial error were premised on Sanford's misunderstanding of female anatomy, specifically, his mistaken belief that "*mons pubis*" is merely the technical term for external female genitalia rather than a separate body part. Relying on this fundamental error, Sanford argued that the State's DNA expert had given false and contradictory testimony when she told the jury that Sanford's DNA was found on the swabs of the victim's *mons pubis* but not on the swabs of the victim's external genitalia. Sanford also mounted related arguments undergirded by the same misunderstanding of female anatomy, claiming that his trial counsel was ineffective, the real controversy was not fully tried, the prosecutor knowingly used false testimony to convict him,

² The title included a spelling error that we have not reproduced.

and the State did not prove the crimes charged beyond a reasonable doubt. As a separate claim, Sanford alleged that his postconviction counsel was ineffective for concluding that Sanford's case did not present any arguably meritorious postconviction issues.

The State filed a response that included a detailed explanation of female anatomy. In light of the anatomical realities, the State contended that Sanford's claims should be denied.

Sanford asked the circuit court to allow him additional time to file a reply brief, and the circuit court granted that request. On July 28, 2020, within the circuit court's deadline, Sanford filed a second document titled: "Defendant's Pro Se Post-Conviction Motion." In that submission, which the circuit court accepted as a reply memorandum, Sanford conceded error and apologized. He explained that, in preparing his postconviction motion, he had "relied on a diagram that did not specifically identify the *mons pubis* area [and] for that [he was] sorry." He went on say that, nonetheless, his "arguments of ineffective assistance of trial and postconviction counsel are genuine." He then offered a basis for relief different from that in his February 25, 2020 postconviction motion. Specifically, he observed that the DNA analyst's report began with an index of the items of evidence that the analyst received for testing and that the index described Item D as "*mons pubis* swabs ... (receipted as pubic hair standard)."³ From this description of Item D, Sanford concluded that "a DNA sample was developed using a pubic hair sample from the victim's *mons pubis* area." He then argued: "But during the trial, the lab analyst confirmed that she could not identify whether the *mons pubis* DNA was tissue, hair,

³ We observe that the medical records admitted at trial include a section titled: "Evidence Collection Using State of Wisconsin Crime Lab Kit." One of the items in the kit is titled: "Pubic Hair Standards or *Mons Pubis* Swabs." This item is checked as collected.

saliva, or any other biological material.” He went on to restate his arguments regarding ineffective assistance of trial counsel and other trial errors as claims tied to the alleged “lie[] about developing a DNA profile from a hair sample.”

The circuit court denied Sanford’s postconviction motion. In a written order, the circuit court agreed with and incorporated the State’s response to Sanford’s postconviction motion, explaining that “all of [Sanford’s] claims are predicated on the same fundamental misunderstanding of the female anatomy and the evidence presented.” The circuit court then determined that, because the *mons pubis* and the lower external vaginal area are different parts of a woman’s anatomy, Sanford’s claims of inconsistent testimony and related allegations of ineffective assistance of counsel and an unfair trial were meritless.

On October 22, 2020, Sanford filed a third document titled “Defendant’s Pro se Post-Conviction Motion.” In the October 2020 submission, he asked the circuit court to reconsider its order denying postconviction relief. The circuit court denied reconsideration. He appeals.

In this court, Sanford states that his “arguments are centered on the grounds [that the] lab analyst ... [gave] perjured evidence alleging she developed a DNA profile from a hair sample off victim B.S.M.’s *mons pubis* area matching [Sanford’s] DNA profile but then later testified she cannot identify what the DNA material was.” He acknowledges that in his postconviction motion he “mistakenly argued the *mons pubis* is the vagina area.” He reminds us, however, that his motion for reconsideration raised different claims. In the remainder of his appellant’s brief, Sanford explains that, in his view, the lab analyst testified falsely and his trial counsel was ineffective for failing to obtain an independent expert “because there was no pubic hair material

recovered from” the victim’s *mons pubis*. He asserts that these allegations give rise to numerous grounds for a new trial.

The standard for evaluating a postconviction motion is familiar. A circuit court is not required to grant a hearing on a postconviction motion unless it contains sufficient allegations of material fact that, if true, would entitle the defendant to relief. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents a question of law for our independent review. *See id.* If the postconviction motion does not include sufficient allegations of material fact that, if true, entitle the defendant to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has the discretion to deny a postconviction motion without a hearing. *See id.* We review discretionary decisions with deference. *See id.*

Our review process is also familiar. When we assess the sufficiency of postconviction claims, we consider only the content of the postconviction motion, not the movant’s briefs. *See id.*, ¶27. Our inquiry is whether the defendant alleged, within the four corners of the postconviction motion itself, “the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *See id.*, ¶23.

In this case, Sanford presented claims in his postconviction motion that all stemmed from his mistaken belief that the *mons pubis* is merely the technical word for external genitalia. After he reviewed the assistant district attorney’s response to that motion, however, he filed a reply memorandum conceding error in that regard. Although he also purported to raise additional claims in the reply memorandum, he could not raise them in that document. We will not read into a postconviction motion allegations that are not contained within the four corners of the

motion. *See id.*, ¶27; *see also State v. Romero-Georgana*, 2014 WI 83, ¶64, 360 Wis. 2d 522, 849 N.W.2d 668.

Sanford might have sought leave from this court to extend the time for filing a postconviction motion so that he could bring claims in addition to those that he raised in his February 2020 submission. *See* WIS. STAT. RULES 809.30(2)(h), 809.82(2)(a); *see also State v. McReynolds*, 2022 WI App 25, ¶¶19-20, 402 Wis. 2d 175, 975 N.W.2d 265. He did not seek such relief. Accordingly, the claims he attempted to raise in later circuit court submissions were untimely. The only claims that he properly raised were contained in the postconviction motion that he filed on February 25, 2020. Sanford conceded error as to the substantive basis for those claims, however, and he has no basis to present those claims to this court for review. Indeed, he has not tried to do so.

Instead, Sanford asks us to review the claims that he presented in his October 22, 2020 motion for reconsideration. The grounds for relief that he presented in that motion, however, were tied to the claims he attempted to raise in his July 28, 2020 reply memorandum, not the claims that he presented in his February 25, 2020 postconviction motion. As we have just explained, the claims in his reply memorandum were untimely. Accordingly, the circuit court did not err by denying his motion for reconsideration. *See Allen*, 274 Wis. 2d 568, ¶27.

For the sake of completeness, we observe that, to whatever extent Sanford may have attempted in his February 25, 2020 postconviction motion to raise claims of trial court error and ineffective assistance of trial counsel that were unrelated to claims based on his ignorance of female anatomy, the circuit court properly rejected any such claims. According to Sanford, his trial counsel performed deficiently by failing to retain a DNA expert and by failing to conduct an

adequate cross-examination of the State’s DNA expert.⁴ As to the former contention, however, he failed to identify an expert that would have testified on his behalf, and he failed to provide anything from either a prospective expert or from some alternative authoritative source showing what an expert would say to assist him. *See id.*, ¶23 (reflecting that a defendant should allege “who, what, where, when, why, and how” in a postconviction motion so as to provide “the kind of material factual objectivity” necessary for meaningful review of claims). Rather, Sanford asserted without any expert support that “an alternative witness would have said” certain things favorable to his defense. Absent allegations that an identified expert or authority would have provided the hoped-for testimony, however, his assertion is merely optimistic speculation. Such speculation is insufficient to demonstrate either that his trial counsel performed deficiently by forgoing an expert, *see State v. Leighton*, 2000 WI App 156, ¶¶38-39, 237 Wis. 2d 709, 616 N.W.2d 126, or that Sanford suffered any prejudice from the alleged deficiency, *see State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

As to Sanford’s complaint that his trial counsel conducted an insufficient cross-examination of the State’s expert witness, Sanford’s postconviction motion failed to show that

⁴ We emphasize that we are unconvinced that such claims were separate and distinct from the claims based on Sanford’s misunderstanding of female anatomy and his lack of scientific knowledge. To the contrary, Sanford asserted in his February 25, 2020 postconviction motion that his trial counsel was ineffective for failing to retain an expert because “the *mons pubis* swab is only a technical name for the external genital swab,” and he further asserted that his trial counsel failed to adequately confront the State’s DNA expert because “the *mons pubis* area is the external genital area of a woman’s body.”

the State's witness made a prejudicial error or a misstatement that his trial counsel could have but did not expose.⁵ The circuit court properly denied his claim as conclusory and unsupported.

We next reject Sanford's claim that the evidence against him was insufficient to prove his guilt beyond a reasonable doubt.⁶ Whether evidence was sufficient to support a verdict is a question of law that we review *de novo*, see *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410, and our review is "highly deferential," see *State v. Rowan*, 2012 WI 60, ¶26, 341 Wis. 2d 281, 814 N.W.2d 854. Accordingly, we may not reverse a criminal conviction unless the evidence, viewed most favorably to the State, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." See *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If there is any possibility that the jury could have drawn the appropriate inferences from the evidence to find guilt, we may not overturn a verdict, and if more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. See *id.* at 506-07. Assessing the credibility of the witnesses rests exclusively with the jury. See *State v. Wilson*, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). We defer to the jury's great advantage in weighing and sifting conflicting testimony and assessing nonverbal cues. See *id.*

⁵ As the State accurately points out, trial counsel vigorously cross-examined the State's expert, questioning her about her potential bias in favor of the State and about the thoroughness of her work. Moreover, trial counsel's cross-examination elicited a concession from the expert that secondary transfer of DNA can occur through contact with a toilet seat, which provided support for Sanford's defense.

⁶ A claim that the evidence at trial was insufficient to support a conviction may be raised for the first time on appeal. See WIS. STAT. § 974.02(2). We therefore consider Sanford's claim of insufficient evidence without regard to whether Sanford raised that claim in his February 25, 2020 postconviction motion.

Here, Sanford fails to identify the element or elements of the charges against him that the State failed to prove. Instead, Sanford challenges the credibility of the State's DNA expert. The jury, however, not this court, assesses the credibility of the witnesses and determines how much weight to assign their testimony. *See id.* Accordingly, we reject Sanford's challenge to the sufficiency of the evidence.

We next reject the claim that Sanford is entitled to a new trial in the interest of justice. We may order a new trial in the interest of justice if the record indicates "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" *See* WIS. STAT. § 752.35. "[R]eversals under WIS. STAT. § 752.35 are rare and reserved for exceptional cases." *State v. Kucharski*, 2015 WI 64, ¶41, 363 Wis. 2d 658, 866 N.W.2d 697. This case does not present such exceptional circumstances.

The evidence in this case was overwhelming, reflecting an astronomically high probability that Sanford was the male person who deposited his genetic material on the *mons pubis* of B.S.M., a woman who did not know him. Although Sanford insists that the proof of this fact was flawed and the DNA expert's testimony was not adequately challenged, he failed to offer any scientific evidence in support of those allegations. In the absence of any expert opinion to support his self-serving contentions, we reject his claim that this case is so extraordinary as to warrant a new trial.

Last, we consider Sanford's claim that his postconviction counsel was ineffective for failing to file a postconviction motion on Sanford's behalf. Sanford made this argument in his February 25, 2020 submission, but the circuit court did not directly address the issue. Upon review, we reject the claim. The record reflects that Sanford chose to represent himself because

his postconviction counsel advised him that postconviction litigation would lack arguable merit. Sanford concedes that he elected to represent himself but he states that his counsel was nonetheless ineffective because his counsel would not pursue any claims on his behalf. Sanford states: “this harmed my defense because now I had to argue these issues myself.” However, “a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’” *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). For all the foregoing reasons we affirm.

IT IS ORDERED that the judgment of conviction and the postconviction orders 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