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DISTRICT I

October 11, 2022

To:

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

Rex Anderegg
Electronic Notice

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

John D. Flynn
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
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Donald V. Latorraca
Assistant Attorney General
Electronic Notice

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

2020AP1623-CR State of Wisconsin v. James A. Pederson (L.C. # 2015CF2834)

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).

James A. Pederson appeals a judgment of conviction and an order denying his postconviction motion.¹ Pederson argues that the postconviction court erred when it denied his motion without holding a *Machner* hearing.² Based upon our review of the briefs and the

¹ The Honorable Michelle Ackerman Havas presided over Pederson's jury trial and entered the judgment of conviction. The Honorable Jeffrey A. Wagner issued the order denying Pederson's postconviction motion.

² See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).³ We affirm.

The State charged Pederson with burglary, substantial battery, and strangulation involving his ex-girlfriend, M.L., on June 16-17, 2015, in her home. Before trial, the State sought to admit a prior act concerning Pederson's past physical abuse of M.L.

According to the State, on May 31, 2015, roughly two weeks before the incident in this case, Pederson entered M.L.'s home without consent and pinned her in the bathroom, leaving bruises on her arms. The State argued that this evidence was admissible to establish Pederson's identity as M.L.'s attacker, his motive, and the context for the underlying crime. The circuit court ultimately held that the evidence was admissible.

During trial, the prosecutor asked M.L. to describe what happened on May 31, 2015. M.L. testified that after she and Pederson broke up, Pederson entered her home on that date without permission. M.L. said that she saw Pederson standing in the hallway outside her upstairs bathroom at around 2:00 a.m. and that she had not invited him over. Pederson tried to approach M.L., and M.L. asked him to leave multiple times. M.L. locked herself in the bathroom when Pederson did not leave. When Pederson started to leave, M.L. followed him downstairs and asked him to return her garage door opener, which he had used to gain entry to her home. M.L. said that Pederson went to his car, yelled profanities, and threw the opener at her face.

³ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On cross-examination, trial counsel questioned M.L. about the May 31st incident. M.L. testified that she had been out with friends that night, that she called Pederson six times around 3:00 a.m., that Pederson eventually called her back, that they spoke for approximately twenty minutes, and that Pederson returned her garage door opener outside the residence.

Neither the prosecutor, nor trial counsel asked M.L. if Pederson had physical contact with her during the May 31st incident, including whether he pinned her in the bathroom and left bruises on her arms or bit her, as she had reported to the police.

During trial, Pederson testified that on May 31st, he received six calls from a number he did not recognize, but then heard a voicemail and realized it was from M.L. Pederson said he called M.L., and she asked him to stop by because she was not feeling well. Pederson claimed that M.L. told him to use the garage door opener and come in through the garage. He said he entered the house and heard M.L. throwing up inside the bathroom. Pederson believed that M.L. had had too much to drink and said that he waited on M.L.'s bed for her to exit the bathroom. Pederson testified that when the door opened, M.L. seemed surprised to see him, asked him to leave, followed him out of the house, and asked him to return the door opener. Pederson returned the opener, but denied throwing it at her.

On cross-examination, Pederson acknowledged that he and M.L. exchanged text messages and none of the messages showed that M.L. invited him to her house on May 31st. Pederson denied that there was any yelling or cursing or that he did anything abusive toward M.L. on May 31st.

Trial testimony additionally revealed that Pederson moved in with M.L. after they began dating in 2014. Their relationship ended, and Pederson moved out on Memorial Day weekend in

2015. After the breakup, M.L. and Pederson continued to communicate with each other by text messages and phone calls. M.L. testified that Pederson wanted to get back together with her.

On June 16, 2015, M.L. met Pederson at a Menomonee Falls restaurant to tell him that their relationship was over and that she wanted no further contact. M.L. said that the conversation became more hostile as Pederson kept trying to touch her hands. M.L. said that Pederson was very distraught and told her she was “ripping his heart out.” M.L. pushed Pederson away when he attempted to hug her. M.L. and Pederson exchanged additional text messages that night. In one message, Pederson said, “Thank you for completely ripping my heart out.” Pederson sent other text messages stating that M.L. was the only person he ever loved and accusing her of having sex with someone else.

M.L. testified that the last text was at 11:30 p.m. M.L. said that she later called Pederson to find out where he was. Pederson did not answer, and M.L. went to bed. Before doing so, M.L. said that she checked the doors to make sure that they were locked.

M.L. testified that she woke up because someone was on top of her, punching her in the face and head. M.L. could not see because a pillow was on her face. M.L. said that she could not breathe when the pillow was pushed down on her face. M.L. identified Pederson as her attacker based on how he felt, including her familiarity with Pederson’s facial structure and facial stubble, the two studs in his ear, the feel of a fake leather jacket that he always wore, and the smell of the cologne that he often used and had been wearing when they met earlier that evening.

M.L. testified that she decided to play dead. Shortly thereafter, the attack stopped, and Pederson got up and pushed her. M.L. said she remained still until she thought that he had left.

M.L. said her phone was not on the nightstand where she normally kept it, so she grabbed a golf club and ran to a neighbor's house. She told her neighbor that Pederson attacked her and used her neighbor's phone to call 911.

M.L. sustained several injuries, including a fractured right orbital socket, a bloody nose, bruising to her face, a bump on her forehead, a bruised arm, a swollen hand, and a chipped tooth. Medical records reflected that M.L. told providers that she knew the attacker was her "husband" based on the feel of his face. M.L. explained she was referring to Pederson.

M.L.'s neighbor, L.C., testified that around 1:00 a.m., she heard her doorbell ring; she got up, saw it was M.L., and she opened the door. L.C. observed injuries to M.L.'s face. M.L. used L.C.'s phone to dial 911. L.C. testified that M.L. said, "Somebody came into my house and beat me. It was James."

Fox Point police officer Steven Grossmueller arrived within two minutes of the call, at approximately 12:45 a.m. He described M.L. as anxious, afraid, shaking, crying, and with noticeable injuries. M.L. identified her ex-boyfriend, Pederson, as the person responsible for her injuries. Grossmueller said that M.L. identified Pederson as her attacker based on his facial structure, his scruffy beard, and his thin arms.

Fox Point police officer John Adamaitis testified that officers seized a pair of jeans from Pederson's closet while executing a search warrant at his Hartford home. According to Adamaitis, the jeans were described in the warrant and believed to be the pants Pederson wore the evening before the attack. Pederson testified that he wore these jeans when he met M.L. Wisconsin State Crime Laboratory DNA analyst Olga Leider identified M.L. as the source of a blood stain on the back of the jeans.

Pederson testified that he gave M.L. his key to her house in February 2015, while he was still living with her and that he did not have a duplicate. Pederson said that he returned the door opener on May 31st.

Pederson additionally testified that he met with M.L. for drinks on June 16, 2015. They spoke about family and work, and he agreed to call the dealership about delays associated with fixing her car. Pederson felt hurt and sad, but not angry or enraged when M.L. told him she was seeing someone else. Pederson said that M.L. pulled her hand away when he attempted to touch it and that M.L. was not receptive when he hugged her.

Pederson said that M.L. texted him as he drove home. Pederson admitted texting M.L. back. Pederson said that they also had a twenty-minute phone call, which ended when he got home at 11:15 p.m. Pederson went to sleep at approximately 11:30 p.m. and did not wake up until 5:15 a.m. the following morning. Pederson said that there were no marks, bruises, or scratches on him when officers examined him the next day.

The jury subsequently found Pederson guilty of each crime. Pederson moved for postconviction relief, arguing that his counsel was ineffective for failing to impeach M.L. He argued that M.L.'s testimony about the May 31st prior act was inconsistent with her statement to the officers about the incident where she said Pederson had pinned her against the wall, bruised her arm and bit her. Pederson argued that M.L.'s statements to officers about the physical abuse were false and trial counsel should have impeached her trial testimony. The circuit court denied Pederson's motion without a *Machner* hearing.

Pederson claims that the postconviction court erred in denying his motion without a hearing. However, a postconviction motion alleging ineffective assistance of counsel does not

automatically trigger the right to a *Machner* hearing. *State v Phillips*, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. In our review of a postconviction court’s denial of a *Machner* hearing, we review whether the motion on its face alleges sufficient facts, which would entitle the defendant to relief. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). “[A]n evidentiary hearing is not mandatory if a defendant’s motion presents only conclusory allegations or if the record as a whole conclusively demonstrates that the defendant is not entitled to relief.” *State v. Spencer*, 2022 WI 56, ¶47, 403 Wis. 2d 86, 976 N.W.2d 383 (citation omitted).

To obtain a *Machner* hearing, Pederson’s motion needed to allege facts sufficiently showing both deficiency and prejudice, which if true, would entitle him to relief. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance results from specific acts or omissions of counsel that are “outside the wide range of professionally competent assistance.” *Id.* at 690. Prejudice occurs when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

Because Pederson’s motion failed to allege sufficient facts to show counsel’s alleged error prejudiced him, we need not address whether it alleged sufficient facts as to whether counsel performed deficiently. *See Strickland*, 466 U.S. at 697 (providing that the court need not address both components of the inquiry if the defendant fails to make an adequate showing on either one). As aptly summed up by the circuit court in its decision resolving Pederson’s postconviction motion:

Someone beat up the victim. The defendant had the means, the motive and the opportunity to do it. The jury heard that forensic

evidence of the defendant's guilt was lacking, save [for] microscopic blood evidence on the back of the jeans he was wearing on the night of the incident. But the jury clearly believed the victim's testimony about her ability to identify the defendant by touch and feel:

Q. And what did you feel when you felt his face?

A. His facial structure. It's a thin face. I reached up with my right hand, and I felt earrings. There's—there was two studs in the ear. I felt what I believed to have been a fake leather jacket. It was this jacket he would always wear. And the more I felt and smelled, it was his cologne. He always wore cologne, and that was one of them, and that was the one that he wore often.

Q. Was that the cologne he had on earlier that evening[?]

A. It was.

Q. And after you were able to feel his face, smell his cologne, feel his facial structure, feel the earrings in his ears, anything about it—did he have any facial hair?

A. He always has some stubble around his face. It was his face.

Q. And when you felt his face as he was beating you, did you feel that stubble?

A. [I did.⁴]

The victim never had any doubt that the defendant was the one who attacked her. She reported it to her neighbor, the police[,] and to medical personnel. The defendant was no stranger to the victim—they had lived together for a year. He was upset that she had ended their relationship. He had shown that he was able to access the victim's home without her permission once before. He did not have an alibi for the night of the incident, and evidence showed that he had deleted a text from his cellphone about GPS tracking, which evinced a consciousness of guilt. The blood evidence was there. There were other possible explanations for this evidence, and there was no other forensic evidence to suggest

⁴ This was M.L.'s response as reflected in the trial transcript. The postconviction court misquoted it in its decision.

that the defendant was the perpetrator. As the defendant states, “[t]his was, in the most literal sense of the phrase, a *he said—she said* case.” The jury understood that the key issue during the trial was the credibility of the witnesses, and this instance, they believed in the victim’s ability to identify the defendant. The court is not persuaded to a reasonable probability that impeaching the victim’s testimony with the details of her prior statement about another act of violence inflicted upon her by the defendant would have altered the outcome of the trial, and therefore, the court finds that trial counsel was not ineffective for failing to pursue this line of impeachment.

(Citations omitted.)

We agree with the postconviction court’s analysis of the prejudice prong of the ineffective-assistance analysis, which is supported by the record, and adopt it as our own. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) (“When the [circuit] court’s decision was based upon a written opinion ... that adequately express[es] the panel’s view of the law, the panel may incorporate the [circuit] court’s opinion ... or make reference thereto, and affirm on the basis of that opinion.”). The record as a whole conclusively demonstrates that there is no reasonable probability that the jury would have acquitted Pederson if trial counsel had asked M.L. if Pederson physically abused her on May 31st. *See Spencer*, 403 Wis. 2d 86, ¶47.

Therefore,

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