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**DISTRICT II**

January 25, 2023

To:

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Circuit Court Judge  
Electronic Notice

Marcella De Peters  
Electronic Notice

Kristina Secord  
Clerk of Circuit Court  
Walworth County Courthouse  
Electronic Notice

Christine A. Remington  
Electronic Notice

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

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2021AP1122-CR

State of Wisconsin v. Lupe Medina, III (L.C. #2015CF7)

Before Gundrum, P.J., Neubauer and Grogan, 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).**

The State appeals the circuit court's order granting Lupe Medina, III's postconviction motion for a new trial based on ineffective assistance of counsel. 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).<sup>1</sup> We reverse and reinstate Medina's conviction.

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

Medina was convicted following a jury trial of two counts of repeated sexual assault of a child and one count of second-degree sexual assault. The charges stemmed from allegations that he sexually abused his girlfriend's daughter from when she was nine years old until she was seventeen. At trial, the defense accused the victim of making up the allegations, in part, to seek attention.

Medina brought a postconviction motion for a new trial based, in part, on ineffective assistance of counsel. Medina alleged he was denied the effective assistance of counsel when his trial counsel failed to subpoena Kaitlin Friberg to testify the victim had previously recanted her allegations. Medina argued he was prejudiced by trial counsel's deficient performance.

To establish a claim of ineffective assistance, a defendant must prove both: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sholar*, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89. We need not address both elements of the ineffective assistance test if the defendant fails to make a sufficient showing on one of them. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. Here, we conclude Medina has failed to establish prejudice.

“To prove prejudice, a defendant must establish that ‘particular errors of counsel were unreasonable’ and ‘that they actually had an adverse effect on the defense.’” *Sholar*, 381 Wis. 2d 560, ¶33 (citation omitted). We evaluate whether “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.” *Strickland*, 466 U.S. at 694.

Medina argues he was prejudiced by trial counsel's failure to subpoena Friberg. Friberg, who at the time was the cousin of Medina's son's girlfriend, went to the same middle school as the victim. Medina wanted Friberg to testify that during a middle school group session the victim disclosed the assaults to the group, but then recanted the allegations to Friberg. However, Friberg's testimony from the *Machner*<sup>2</sup> hearing was vague and equivocal and differed in some respects to what she told trial counsel before Medina's trial. Friberg also failed to establish details regarding the group session. She did not know whether the victim was telling the truth about the assaults and simply assumed the victim made up the allegations to seek attention. Friberg's testimony was ambiguous at best, and, in some respects, cumulative to the testimony of the other witnesses. At trial, Medina called multiple witnesses to undermine the victim's credibility and pursued many avenues in an attempt to convince the jury that the victim was not credible. There was no likelihood that trial counsel's failure to subpoena Friberg prejudiced Medina. *See Strickland*, 466 U.S. at 694. His ineffective assistance of counsel claim fails.

IT IS ORDERED that the order of the circuit court is reversed and Medina's conviction is reinstated. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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

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

