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DISTRICT I

June 20, 2023

To:

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

2022AP608-CR	State of Wisconsin v. Calvin Jesse Hicks (L.C. # 2019CF766)
2022AP609-CR	State of Wisconsin v. Calvin Jesse Hicks (L.C. # 2019CF4919)

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).

Calvin Jesse Hicks appeals from judgments of conviction and from an order denying postconviction relief. At trial, the State presented evidence that Hicks shot his girlfriend, A.D., fled the scene in a vehicle that he stole from a citizen at gunpoint, and then, following his arrest, sought to prevent A.D. from testifying against him. The jury found him guilty of eight crimes. Hicks alleged in postconviction proceedings that his trial counsel was ineffective for failing to introduce evidence that A.D. received fentanyl treatments at the hospital shortly before she told a detective that Hicks was the person who shot her. Hicks claimed that this evidence would have impeached A.D.'s incriminating statements to the detective and would probably have changed the

outcome of the trial. The circuit court denied the claim without a hearing. On appeal, Hicks argues that the circuit court erred. Based upon a review of the briefs and records, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We summarily affirm.

A.D. testified at trial that on February 14, 2019, she fell asleep in a van that Hicks was driving, and she awoke to realize that Hicks was outside the van in an alley "tussling" with a "total stranger" that she had never seen before. She said that she got out of the van to help Hicks. As the three people fought, she heard a gunshot, and she fell to the ground. Hicks immediately ran south towards the back of the van and the unknown assailant continued firing shots at A.D. before running north away from the alley. A.D. said that eventually someone found her and called the police. An ambulance arrived and brought her to the hospital.

A.D. acknowledged on the stand that she spoke to Detective Angela Juarez at the hospital, and A.D. further acknowledged identifying Hicks at that time as the person who shot her, but A.D. testified that her accusation against Hicks was false. When asked on cross-examination why she implicated Hicks, she said that she felt "angry," "bitter," and "betrayed" by Hicks's actions in deserting her after the shooting. She went on: "Why would he leave me out there? I was getting out [of the van] to help him. At that time, I didn't care who went down for it, it was his fault for me, maybe he could have helped a little more, but he left to chance [sic]." A.D. also testified that she was telling the truth at trial and that she loved Hicks.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The State then introduced A.D.'s statement at the hospital through the testimony of Detective Juarez. The detective testified that she interviewed A.D. at 8:00 p.m. on February 14, 2019, approximately an hour after A.D. arrived at the hospital. The detective said that A.D. had "seven to eight holes in her body" and "was in excruciating pain," but she was able to talk. She "immediately told [the detective] that the person that did this ... was Calvin Hicks and provided his birthdate." According to Detective Juarez, A.D. then described how she was riding in the van that Hicks was driving when they got into an argument. Hicks pulled into an alley, dragged her out of the van, and punched her repeatedly. After she fell to the ground, he produced his gun and shot her. A.D. said that she next heard Hicks trying to start the van, but he was unsuccessful. She began begging him to take her to the hospital, but he got out of the van and ran from the alley. A.D. said that she "started to call for help and then an unknown person came and assisted her."

Milwaukee Police Officer Joshua Heder testified that he responded to a reported shooting on February 14, 2019, and found A.D. in an alley in the area of North 33rd and West Galena Streets. The officer activated his body camera and recorded his interaction with A.D. in the alley. She was suffering from multiple gunshot wounds, including one to her face, and she had difficulty answering questions, but she told Officer Heder that she knew who shot her.

A.D.'s mother, A.S., described hurrying to the hospital on the day that A.D. was shot. A.S. said that she stayed at the hospital with A.D. "for days," and that A.D. consistently said that Hicks was the person who shot her.

The State also presented testimony from R.J., who said that on February 14, 2019, he was the victim of a carjacking. He testified that he parked his car near the 3300 block of Galena Avenue, and when he got out of the car, he was confronted by a gunman. R.J. surrendered his

keys, and the gunman drove away in R.J.'s car. R.J. then heard someone crying for help in a nearby alley. He followed the sound and found a woman, later identified as A.D., along with two other citizens who were calling an ambulance for her.

R.J. went on to testify that police subsequently showed him a photo array to see if he could identify the suspect who took his car at gunpoint, but R.J. testified that he was unable to make an identification. However, he acknowledged telling the police that one of the people in the photo array appeared to be the carjacker, although R.J. "wasn't a hundred percent." A police officer subsequently testified that Hick's picture was the one that R.J. hesitated over when he viewed the photo array.

A DNA analyst from the Wisconsin State Crime Lab testified that DNA recovered from the steering wheel of R.J.'s stolen car contained a mixture of contributors, and that the DNA profile of the major contributor was consistent with Hicks's DNA profile. The expert further testified that the probability of randomly selecting a person with the same profile as the major contributor was one in 145 trillion, a number far larger than the population of people on earth.

The State additionally presented evidence that Hicks discouraged A.D. from cooperating with the prosecution after his arrest. In a recorded telephone call that Hicks made from jail, he directed A.D to leave Milwaukee and stay with his sister, who lived in Chicago. In later recorded calls, he urged A.D. to change her description of the shooting, telling her at one point that she must either recant or tell the truth. None of the calls that Hicks made from jail included any discussion of an attack by a stranger during which Hicks was assaulted and A.D. was shot.

The jury found Hicks guilty of seven felonies: attempted first-degree intentional homicide and first-degree reckless injury, both by use of a dangerous weapon and as acts of domestic abuse;

possessing a firearm as a felon; operating a motor vehicle without owner's consent while possessing a dangerous weapon; solicitation of perjury; and felonious intimidation of a witness and of a victim, both as acts of domestic abuse and as a party to a crime. The jury also found Hicks guilty of a misdemeanor charge of intimidating a victim.

Hicks filed a postconviction motion alleging that his trial counsel was ineffective for failing to introduce evidence that A.D. received fentanyl to control her pain shortly after she arrived at the hospital.[2] Hicks asserted that this evidence "would have helped impeach A.D.'s first account" of the shooting. His motion provided a link to the website medlineplus.gov, which includes a list of fentanyl's potential side effects, and he argued that these potential side effects "would give the jury a reason to doubt" A.D.'s statements to Detective Juarez. The circuit court denied the claim without a hearing, explaining that the allegations were conclusory because Hicks had "not provided anything from a doctor or other expert suggesting how the specific amount of fentanyl in the victim's system at the time she was interviewed by police would have affected her mindset or ability to provide a truthful statement." Hicks appeals.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a

[2] Relying on A.D.'s medical records, Hicks alleged that A.D. first received fentanyl at 7:01 p.m. on February 14, 2019, and that she received eight additional doses as of 9:00 p.m. that evening.

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Although a defendant alleging ineffective assistance of counsel must seek to preserve counsel's testimony in a postconviction hearing, *see* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), the defendant is not automatically entitled to such a hearing, *see* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Rather, the circuit court is required to hold an evidentiary hearing only if the defendant has alleged, within the four corners of the postconviction motion, "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶¶14, 23, 274 Wis. 2d 568, 682 N.W.2d 433. A defendant's postconviction motion will normally be sufficient if it includes allegations that establish "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***id.***, ¶23. Whether a defendant's motion alleges sufficient material facts to entitle the defendant to relief is a question of law that we review *de novo*. *See* ***id.***, ¶9. If a defendant's 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 circuit court, in its discretion, may deny relief without a hearing. *See* ***id.***, ¶¶9, 34. We review a circuit court's discretionary decisions with deference. *See* ***id.***, ¶9.

With the foregoing principles in mind, we examine whether Hicks made a sufficient showing in his postconviction motion to require the circuit court to grant a hearing on his claims. We conclude that he did not.

Preliminarily, we observe that Hicks conceded in his circuit court submissions that "there is no case law which is directly on point dealing with impeachment of a witness's account on the

basis of information contained in medical records." However, "'ineffective assistance of counsel cases are limited to situations where the law or duty is clear.'" ***State v. Arrington***, 2022 WI 53, ¶73, 402 Wis. 2d 675, 976 N.W.2d 453 (citation and brackets omitted). For this reason alone, the circuit court could properly deny Hicks's claim without a hearing.

We also observe that Hicks alleged in his postconviction motion that his trial counsel performed deficiently because counsel "failed to attack the credibility of A.D.'s first account," but in fact trial counsel did attack the credibility of that account. Under trial counsel's cross-examination, A.D. recanted the statement she made at the hospital and told the jury that she had falsely accused Hicks because she felt angry, bitter, and betrayed when he abandoned her after she was shot by a stranger. "[T]here is a strong presumption that trial counsel's conduct 'falls within the wide range of reasonable professional assistance," and reviewing courts afford trial counsel's strategic choices "'great deference.'" ***State v. Breitzman***, 2017 WI 100, ¶38, 378 Wis. 2d 431, 904 N.W.2d 93 (citations omitted). Here, we see no basis to conclude that trial counsel performed unreasonably by relying on A.D.'s trial testimony to explain to the jurors why they should disbelieve the statement that A.D. made to Detective Juarez at the hospital. Indeed, Hicks failed even to suggest in his postconviction motion that counsel acted unwisely by explaining A.D.'s recantation on this basis.[3]

[3] In this court, Hicks asserts that "[i]t is illogical and irrational" to contend that anger, bitterness, and a sense of betrayal motivated A.D. to make a false accusation against him. Hicks raises this claim for the first time in his appellate briefs, however, and we consider only the four corners of his postconviction motion when assessing the sufficiency of his postconviction claim. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. Moreover, were we to consider his assertion, we would reject it because Hicks fails to offer any support for his allegation that the theory of defense was illogical or irrational. We observe that vengeance is readily understood by jurors as a motive for a false accusation. *See, e.g.* ***State v. Bell***, 2018 WI 28, ¶21, 380 Wis. 2d 616, 909 N.W.2d 750 (describing a prospective juror's response that "'revenge'" was a reason for making a false accusation).

We turn to the crux of Hick's postconviction claim, specifically, the allegation that Hicks's trial counsel performed deficiently for failing to "introduce[] evidence [that] A.D. was under the influence of a powerful opioid, which would impact [her] mental function when [she] gave her first account of the shooting." Hicks's postconviction motion, however, did not satisfy the pleading requirements set forth in ***Allen***, because Hicks did not allege the facts that he could prove to support a claim for relief. *See* ***id.***, 274 Wis. 2d 568, ¶¶23-24. The postconviction motion did not identify who would testify that the potential side effects of fentanyl "would impact" A.D. under the circumstances; why that unidentified witness concluded that A.D. was experiencing side effects of the medication at the time of her interview with the detective; how much fentanyl A.D. had absorbed at the time of the interview; what side effects the dosage she absorbed would have had under the circumstances; and when any side effects would have occurred. Hicks's allegations were thus insufficient to demonstrate any deficiency in trial counsel's performance.

Hicks disagrees. He argues that he has alleged "the five 'w's and one 'h'" required for a sufficient postconviction motion, *see* ***id.***, ¶23, because he identified the lawyer who was allegedly ineffective, the times and amounts of the fentanyl treatments that A.D. received, and the potential side effects of fentanyl that are listed on a reputable website. Hicks misunderstands ***Allen***. As that case explains, a postconviction motion, although "replete with information," is nonetheless insufficient when it "fail[s] to explain how and why [the information] matters." *See* ***id.***, ¶¶24, 29. Here, Hicks failed to allege facts showing that A.D.'s medical treatment was material to the statements that A.D. gave at the hospital, and he failed to identify the witness who would testify about those necessary facts. In sum, Hicks offered only conclusory allegations that his trial counsel performed deficiently by forgoing evidence that A.D. received fentanyl at the hospital before speaking to Detective Juarez.

Because Hicks failed to demonstrate that his trial counsel performed deficiently, we need not consider whether Hicks was prejudiced by his trial counsel's actions. *See* ***Strickland***, 466 U.S. at 697. We do so for the sake of completeness. We conclude that Hicks failed to demonstrate that evidence of A.D.'s fentanyl treatment would probably have changed the outcome of the trial. *See* ***id.*** at 694.

Hicks's theory of the case was that A.D. lied when she said that Hicks was the shooter and that A.D. told the truth at trial when she said that a "total stranger" shot her multiple times. Hicks argues now that the jury would have believed A.D.'s trial testimony and concluded that her statement to Detective Juarez was false had the jurors known that A.D. was "dosed with synthetic opioids" at the hospital before she spoke to the detective. The trial evidence, however, included the statements that A.D. made to Officer Heder when he found her in the alley. Those statements included A.D.'s declaration that she knew who shot her. Because Hicks does not explain how and why A.D.'s statements in the alley would fit his theory that A.D. claimed to know her assailant only because she was addled by the fentanyl she received at the hospital, he fails to show that evidence about her fentanyl treatment was reasonably likely to affect the jury's verdicts.

Moreover, as the circuit court thoroughly explained, trial counsel implemented a strategy of demonstrating to the jury that A.D. falsely accused Hicks as revenge for his action in abandoning her after she was shot by an unknown assailant. A.D.'s testimony supported that theory of defense. She maintained that her statements at the hospital were untrue, and she expressly attributed them to her feelings of anger, bitterness, and betrayal. The jury, however, did not find that testimony credible in light of the substantial evidence that Hicks was the shooter. As we have discussed, this included: A.D.'s statements on the day of the shooting that she knew who shot her and that Hicks was the shooter; evidence that the shooter carjacked a getaway vehicle in which DNA consistent

with Hicks's DNA profile was later found on the steering wheel; evidence that the victim of the carjacking, although not confident enough to make an identification, thought that Hicks's picture in a photo array depicted the carjacker; and evidence that Hicks engaged in witness intimidation and in efforts to suborn perjury while he was incarcerated awaiting trial. In light of the testimony and physical evidence, Hicks failed to set forth sufficient facts to show why the outcome of the case would have been different if counsel had showed the jury that A.D. received fentanyl to treat her pain when she arrived at the hospital. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgments of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals