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**DISTRICT III**

June 20, 2023

To:

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Circuit Court Judge  
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Clerk of Circuit Court  
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Electronic Notice

Michael J. Estevez 462882  
Green Bay Correctional Inst.  
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You are hereby notified that the Court has entered the following opinion and order:

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2022AP312-CR                      State of Wisconsin v. Michael J. Estevez  
(L. C. No. 2018CF23)

Before Stark, P.J., Hruz and Gill, 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).**

Michael Estevez, pro se, appeals from judgments convicting him of three drug charges and from an order denying his postconviction motion for a new trial. Estevez claims that his trial counsel provided ineffective assistance by failing to interview a potential witness, disclosed by Estevez to counsel prior to trial. 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 (2021-22). We conclude that Estevez has failed to satisfy the prejudice element of an ineffective assistance claim because he presented no evidence at his postconviction hearing as to what the potential witness would have told counsel or testified to at trial. Accordingly, we affirm.

The State charged Estevez as a repeat offender with a second or subsequent offense of: (1) delivery of a schedule II narcotic (fentanyl); (2) delivery of heroin (three grams or less); and (3) delivery of tetrahydrocannabinols (200 grams or less). At trial, a confidential informant (CI) testified that he had purchased fentanyl from Estevez during a controlled drug buy on December 5, 2017, and had purchased heroin and marijuana from Estevez during a controlled drug buy on December 15, 2017. Regarding the December 5 transaction, the State presented a video that the CI took showing Estevez handing a fentanyl patch to the CI and explaining to the CI how to use the patch. Regarding the December 15 transaction, the State presented a photograph that the CI took of Estevez sitting in the front passenger seat of a car on December 15, 2017, as well as an audio recording of Estevez saying “it would be a good day to get rid of it all.” The CI also testified that another person, Louis Bayevich, was present during both transactions.

Following his conviction on all three charges, Estevez moved for a new trial based upon ineffective assistance of counsel. Estevez alleged that he had sent a series of letters prior to trial to his trial counsel, Andrew Mongin, informing Mongin about a potential witness who could support Estevez’s claim that Bayevich was the one who actually sold the drugs to the CI. Estevez further alleged that Mongin had never interviewed the witness.

The circuit court held an evidentiary hearing, at which Estevez introduced one of the letters he had sent to Mongin. In the letter, Estevez asserted that Bayevich’s girlfriend, Mika Watters, had purchased drugs from a dealer and then given the drugs to Bayevich, who in turn sold them to the CI. Mongin acknowledged at the hearing that Estevez told him about Watters, but he testified that he did not believe that Watters’ testimony would have been

“fruitful” given the other evidence. When Estevez subsequently attempted to question Watters at a continued hearing, she invoked her Fifth Amendment rights and refused to testify.

The circuit court determined that Mongin’s performance had been deficient with respect to Counts 2 and 3, for which there was no video of the actual drug exchange. However, the court concluded that Estevez could not demonstrate prejudice without any evidence as to what Watters would have told counsel or without any reason to believe that she would have testified at trial without an offer of immunity. The court therefore denied Estevez’s motion for a new trial, and Estevez appeals.

To establish a claim of ineffective assistance, a defendant must prove two elements: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. *State v. Sholar*, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89. We will not set aside the circuit court’s factual findings about what actions counsel took or the reasons for them unless they are clearly erroneous. *See State v. Balliette*, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334. However, whether counsel’s conduct violated the constitutional standard for effective assistance is ultimately a legal determination that this court decides de novo. *Id.* We need not address both elements of the 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 that Estevez has failed to demonstrate prejudice. A defendant proves prejudice by demonstrating there is a reasonable probability that, but for counsel’s unprofessional conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The reasonable probability standard does not require a showing that it is “more likely than not” that a jury would have acquitted the defendant. *Sholar*,

381 Wis. 2d 560, ¶44. Still, the reasonable probability standard is tied to the reviewing court's confidence in the outcome, *see id.*, ¶45, and the "likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

We can see no reasonable probability of a different result here if counsel had attempted to interview Watters prior to trial. First and foremost, Estevez presented no evidence as to what Watters would have told Mongin if Mongin had interviewed Watters. *See State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (to establish prejudice, "[a] defendant who alleges a failure to investigate on the part of his [or her] counsel must allege with specificity what the investigation would have revealed") (first alteration in original; citation omitted). Watters could have denied any involvement in purchasing the drugs or declined to speak to Mongin altogether. Similarly, even if Watters had spoken to Mongin, there is no reason to believe that she would have agreed to testify at trial for the defense without an immunity agreement from the State, given her invocation of her Fifth Amendment rights at the postconviction hearing. Hearsay allegations made by Estevez in his letters to counsel as to what he thought Watters would have said are not the same as admissible testimony or an affidavit from Watters herself.

Next, even if Watters had been willing to testify that she had previously purchased drugs and given them to Bayevich to sell, as Estevez alleged, Watters herself was not present during the drug buys. Therefore, she could not directly refute the CI's testimony that Estevez sold drugs to the CI on the two occasions charged in the complaint. Bayevich could have given or sold the drugs Watters had obtained to Estevez, or Estevez could have obtained different drugs to sell. In other words, Watters' and Bayevich's potential involvement in drug trafficking did not negate Estevez's involvement in the specific drug buys at issue here.

Finally, the video of Estevez handing the CI the fentanyl patch during the first drug buy substantially corroborated the CI's testimony—not only with respect to the fentanyl charge, but overall. It is not substantially likely that the jury would have believed that the CI told the truth about the first drug buy but lied about the second.<sup>1</sup> Because Estevez failed to demonstrate any prejudice from his trial counsel's failure to interview Watters prior to trial, the circuit court properly denied Estevez's motion for a new trial.

Upon the foregoing,

IT IS ORDERED that the judgments of conviction and postconviction order are summarily affirmed. WIS. STAT. RULE 809.21 (2021-22).

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*

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<sup>1</sup> We additionally note that although Estevez complains about the circuit court taking the drug-buy video home to view it on his own equipment, Estevez does not cite any authority that would prohibit the court from doing so or provide any affidavits stating that the video now in the appellate record is different from the video introduced at trial.