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DISTRICT I

July 25, 2023

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

2022AP159-CR State of Wisconsin v. Lamont L. Chappell (L.C. # 2018CF1358)

Before Brash, C.J., Donald, P.J., and Dugan, 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).

Lamont L. Chappell appeals a judgment, entered upon a jury's verdict, convicting him of two counts of first-degree sexual assault of a child under twelve years of age. He also appeals an order denying his postconviction motion, in which he alleged that his trial counsel was ineffective for failing to conduct an investigation, eliciting harmful testimony from defense witnesses, and making remarks that incriminated Chappell. The circuit court concluded that Chappell did not suffer any prejudice as a result of trial counsel's allegedly deficient performance. 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).[1] We summarily affirm.

In April 2018, the State charged Chappell with two counts of first-degree sexual assault of a child younger than twelve years old, alleging that between mid-August 2012 and mid-September 2013, Chappell had sexual intercourse with J.D.Y. and her sister, J.M.J. The information reflected that during the charging period, J.D.Y. had her seventh birthday, and J.M.J. had her sixth birthday. According to the criminal complaint, the assaults occurred while the girls were living with their biological mother, T.W., and her boyfriend, Chappell. The charges proceeded to a jury trial in September 2019.

The State first presented testimony from T.D., the adoptive mother of J.D.Y. and J.M.J. T.D. told the jury that she provided foster care for the girls from 2008 until 2012, when they were reunified with T.W. T.D. said that the girls were subsequently removed from T.W.'s care and, after several interim placements, reunited with T.D. in November 2017. She adopted the girls in June 2018. T.D. described how the girls disclosed Chappell's abuse after they returned to her care and the steps she took following those disclosures. In response to the State's inquiry about the girls' demeanor when discussing the abuse, T.D. said that "[t]hey appear sad, they have a lot of shame, they're embarrassed and they're angry."

J.D.Y., who was fourteen years old at the time of trial, testified that T.W. "had a problem with drugs and alcohol." J.D.Y. said that in 2012, T.W. "was usually drunk or high," and at night she would "go out ... and party," while Chappell remained at home with J.D.Y. When T.W. was

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

away, Chappell would force J.D.Y. to lie down next to him and "suck his area." J.D.Y. then said that she would rather write than say the proper word for a boy's "area," and she wrote: "penius [sic]." In response to another question about the "area," she wrote: "It got hard and got stuff in my mouth and I throw up." J.D.Y. testified that Chappell also used his "area" to touch her buttocks and would attempt to penetrate her from the rear. She said that she would fight this, but he would "try harder" and would hit her. She said that sometimes other men came to the house to visit Chappell, and he would give her a dollar to let them touch her on her chest, legs, and buttocks. In response to the State's inquires about why she did not reveal the abuse earlier than she did, J.D.Y. said that Chappell threatened to kill T.W. if J.D.Y. made such a disclosure, and J.D.Y. believed him. J.D.Y. went on to explain that Chappell regularly physically abused T.W., and J.D.Y. described an incident when he poured lighter fluid on T.W. and held up a lighter, while threatening to kill her.

J.M.J., who was twelve years old at the time of trial, testified that Chappell had "violated her" and then she began to cry. After a recess, J.M.J. testified that the first time she recalled Chappell doing "bad things," he came into her bedroom and told her that if she said anything he would "kill [her] family." J.M.J. testified that she would prefer to write down what happened next. She wrote that Chappell "pulled down his pants and pulled whatever clothing I had on (I don't remember exactly) and he put his penis in my vagina. I tried to fight him off but I couldn't. He was really strong." J.M.J. told the jury that this type of sexual abuse happened more than one time and that Chappell "put his penis in [her] butt too and in [her] mouth." She described an incident in which Chappell said that "he wanted to play a game" and told her to open her mouth "really wide" and he would "put something in there." After threatening to kill one of her family members if she told anyone what he was doing, "he pushed his penis into [her] mouth. [She] was choking

and then he laughed." Additionally, J.M.J. testified that Chappell would demand that she "twerk" in front of other men. She said that this was a kind of sexual dance and that she usually performed it with her clothes on, although on one occasion Chappell required her to take off her clothes.

The State asked J.M.J. where T.W. was during these incidents. J.M.J. said that T.W. had "a pretty big drug and alcohol problem" and "was rarely ever there." J.M.J. then again began to cry.

The jury next watched recordings of forensic interviews with J.D.Y. and J.M.J. During the interviews, each child described how Chappell sexually assaulted her. The children became upset and tearful during these interviews and had difficulty discussing the incidents of abuse.

Lynn Cook, who conducted the forensic interviews, testified regarding the guidelines and techniques for interviewing children. She also explained how threats, fear, and shame can lead to delayed disclosure of sexual abuse. Detective Michael Thomae described watching the forensic interviews and seeing J.D.Y. and J.M.J. write some of their responses to Cook's questions about Chappell's actions. Thomae then identified J.D.Y.'s written response that "he told me to suck it," and J.M.J.'s written response that "he put his private in my private." Thomae further testified that he identified the possible location of the sexual abuse based on J.M.J.'s statement in her interview.

After the State rested, Chappell called T.D. back to the witness stand. When defense counsel asked how the assaults affected the girls, she reiterated that "they say they feel dirty, they know they're not virgins, they feel unclean, disgusted, judged. They compare to other girls their age that haven't had that experience and they are very sad." Under further defense questioning, however, she admitted that although the children were placed with her before and after the alleged

abuse occurred, she did not notice anything prior to their disclosures that led her to believe that they had been sexually assaulted.

Chappell next presented testimony from T.W. She told the jury that the family never lived at the address where J.M.J. suggested the abuse occurred, and T.W. said that she lost custody of the children in September 2013 when Chappell took them to Child Protective Services (CPS) because she was "about to go on the run with them." During the course of her examination, T.W. also testified that she and Chappell had physical fights, that Chappell persuaded her to prostitute herself for a four-day period, and that he introduced her to crack cocaine.

Chappell testified as the final witness in his own defense. He began by acknowledging that he had eleven prior criminal convictions. He denied that he had sexually assaulted either J.D.Y. or J.M.J., explaining that he never had the opportunity to do so because he was never alone with them for more than ten minutes at a time. He admitted, however, that at the time that he lived with the children, he was addicted to crack cocaine and that he stayed at home and "did nothing," while T.W. went to work. He explained that this was why he could say with confidence that he never gave the children any money to perform sex acts: he "didn't have a job.... [He] had nothing."

Chappell denied any domestic violence, while living with the children with the exception of an incident that involved himself, T.W., and "the dope man." Chappell testified that this incident occurred because he and T.W. had failed to pay their drug dealer and that a window in the family's house was shot out during this episode. He further testified that as a result of this incident, CPS personnel directed T.W. to enter a battered women's shelter to avoid losing custody of the children. When she threatened to flee with them instead, he delivered the children to CPS. Chappell acknowledged that he never saw the children again.

The jury found Chappell guilty as charged, and he moved for postconviction relief on the ground that his trial counsel was ineffective in a variety of ways. Specifically, Chappell alleged that his trial counsel improperly elicited testimony from T.D. about how sexual abuse had affected the children. Chappell next alleged that his trial counsel called T.W. as a witness, without first investigating her, and as a result, elicited damaging allegations about other crimes—domestic abuse, drug use, and prostitution—along with a statement characterizing Chappell as a pedophile and child molester; a concession that T.W. left the children alone with him; and an opinion that the children were testifying truthfully.[2] Next, Chappell claimed that his trial counsel made two statements incriminating him. First, Chappell faulted trial counsel for responding to T.W.'s testimony that "evidently something happened" by commenting: "and it may have. That's sort of what we're here about." Second, Chappell faulted trial counsel for asking T.D. when she "found

[2] Trial counsel asked T.W. whether the children were left alone with Chappell, and she answered: "Not if I had a choice. My kids would be with me." The circuit court then interposed a question: "Did you say not if I had a choice?" T.W. responded:

> Not if I had a choice, my kids would be with me. It's very rare that I left [the children] with [Chappell] period, just because of the things I didn't just do. I didn't know that he was going to molest a child, molest or whatever, a pedophile, I didn't know that, but I just would have never thought that nothing like this would ever happen.

Following T.W.'s response to the circuit court's inquiry, trial counsel resumed questioning T.W. about whether she had left the girls alone with Chappell. T.W. answered, in part:

> I don't know, but if it was up to me, I never left my kids with him, but then again, I could have. You know, addiction did play a part in it and that's no excuse, but every time I think about me and my kids, it's me and my kids. I know my kids ain't going to lie about something – about this, so in my mind, I had to be sleeping somewhere, so evidently, yes, for this to happen to them, yes, I left them with him.

T.W. went on to testify that the only time she left the children with Chappell was a four-day period in which she was attempting to prostitute herself, and she confirmed that she did not "have any concern about the safety of [the] girls" at that time. She then added, "[b]ut evidently something happened, so I was wrong."

out from the girls ... that there was some incidence of sexual abuse in their early life." Both statements, he claimed, assumed that he had abused the children.

The circuit court concluded that none of the alleged deficiencies was prejudicial in light of the overwhelming evidence of Chappell's guilt. In reaching this conclusion, the circuit court considered and rejected Chappell's claims that the children's allegations "were entirely unsupported or corroborated [sic]." The circuit court found instead that "the testimony of the two victims was compelling and overwhelming with details." The circuit court then stated that, as it had explained at sentencing:

> the jury made a determination that you are guilty of these two crimes, and the [c]ourt wholeheartedly endorses their verdict. The evidence in this case was overwhelming. It was compelling. It was difficult to watch these two children come into court and relate what you did to them. So the fact that you are convicted of these two crimes is, in this Court's opinion, completely and totally just and right.

Accordingly, the circuit court denied Chappell's postconviction motion without a hearing.

Chappell appeals. He renews the claims that he asserted in the circuit court, and he asserts that he is entitled to a hearing regarding his allegations.

"A hearing on a postconviction motion is only required when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges such facts is a question of law. *See* ***id.***, ¶9. If, however, "the 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 has the discretion to grant or deny a hearing." ***Id.*** We review a circuit court's discretionary decisions with deference. *See* ***id.***

Chappell sought postconviction relief on the ground that he was denied the effective assistance of counsel. Whether counsel was ineffective is a mixed question of fact and law. *See* ***State v. Pico***, 2018 WI 66, ¶13, 382 Wis. 2d 273, 914 N.W.2d 95. "We will not reverse the circuit court's findings of fact unless they are clearly erroneous. 'Findings of fact include 'the circumstances of the case....' We independently review, as a matter of law, whether those facts demonstrate ineffective assistance of counsel." ***Id.*** (citations and some quotation marks omitted).

Our analytical approach is familiar. We assess claims of ineffective assistance of counsel using the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***id.*** To satisfy the deficiency prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To satisfy the prejudice prong, "[t]he defendant must show that 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 the confidence in the outcome." ***Id.*** at 694.

A court may consider either ***Strickland*** prong first, and if the defendant fails to satisfy one prong, the court need not consider the other. *See* ***id.*** at 697. We begin here with the prejudice prong, which is determinative in this case.

Chappell argues that we should presume that he was prejudiced by trial counsel's failure to prevent T.W. from making certain allegations during her testimony, namely that she "know[s her] kids ain't going to lie ... about this," and her accusations implicating Chappell in other wrongful conduct. Chappell asserts that the former allegation violated the rule set forth in ***State v.***

Haseltine, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct.App.1984), that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." As to T.W.'s descriptions of domestic violence, drug use, and prostitution, Chappell claims that this testimony ran afoul of WIS. STAT. § 904.04(2)(a), which prohibits evidence of "other crimes, wrongs, or acts" to prove character. Therefore, he contends, he was necessarily prejudiced. However, our supreme court has outlined the circumstances in which reviewing courts may presume prejudice within the meaning of ***Strickland*** and has described those circumstances as "rare." *See* ***State v. Pinno***, 2014 WI 74, ¶¶83-84, 356 Wis. 2d 106, 850 N.W.2d 207. An attorney's alleged failure to object to evidentiary errors is not among the rare circumstances that ***Pinno*** describes. *See* ***id.*** Indeed, Chappell does not make any effort to show that the alleged failures here fit within the categories described in ***Pinno***. Accordingly, Chappell cannot prevail unless he shows prejudice, which requires him to demonstrate that, but for counsel's alleged errors, the outcome of the trial would probably have been different. *See* ***Strickland***, 466 U.S. at 694.

When assessing prejudice, we consider the totality of the evidence and determine whether counsel's alleged deficiencies undermine our confidence in the verdicts. *See* ***id.*** at 694-95. Here, the totality of the evidence does not show a reasonable likelihood that any or all of the alleged errors affected the outcome of the case. We reach this conclusion because the evidence of guilt was overwhelming and the defense was preposterous. *See* ***State v. McDowell***, 2004 WI 70, ¶64, 272 Wis. 2d 488, 681 N.W.2d 500.

The circuit court found that the testimony of J.D.Y. and J.M.J. was both "overwhelming" and "compelling," and the circuit court found nothing to suggest that the children had been coached or that their allegations were fabricated. We accept these findings, which are supported by the

record. *See* ***Pico***, 382 Wis. 2d 273, ¶13. It shows that each child gave consistent, graphic, and chilling testimony about the assaults that Chappell perpetrated and the threats that he made to prevent disclosure of those assaults. The record also shows that neither child was eager to accuse Chappell and that both children disclosed the abuse many years after they last saw him in 2013, when they were placed outside of his home and had no discernible motive to accuse him falsely.

Chappell denied the children's allegations, but he began his testimony by admitting that he had eleven prior convictions. Our law presumes that convicted criminals "are less truthful than persons who have not been convicted of a crime" and "the more often [a person] has been convicted, the less truthful [that person] is presumed to be.'" ***State v. Gary M.B.***, 2004 WI 33, ¶21, 270 Wis. 2d 62, 676 N.W.2d 475 (citation omitted). Further, Chappell had an obvious motive to deny the allegations.

Moreover, Chappell offered the preposterous defense that he could not have sexually assaulted J.D.Y. or J.M.J. because he did not have the opportunity to do so. He testified that he was never alone with either of them for more than ten minutes at a time, and his closing argument emphasized that the abuse "couldn't have happened under his situation [b]ecause he wouldn't have had access to the children over the period of time that we are talking about." Chappell, however, lived with the children for more than a year. He admitted that throughout that period, T.W. went to work every day, while he stayed at home because he was "an addict" who had no job and "did nothing." No reasonable juror would believe the incredible claim that Chappell never had access to the children and never had the opportunity to be alone with them in these circumstances.

In light of the circuit court's findings about the strength and credibility of the victims' testimony and in light of the absurd nature of Chappell's defense, we agree with the circuit court

that Chappell failed to demonstrate that he was prejudiced by the alleged deficiencies in his trial counsel's performance. In the absence of prejudice, the record conclusively shows that Chappell was not entitled to relief on his claim of ineffective assistance of counsel. *See* ***State v. Cooper***, 2019 WI 73, ¶30, 387 Wis. 2d 439, 929 N.W.2d 192. Therefore, he was not entitled to a hearing on his motion, and we discern no erroneous exercise of discretion in the circuit's court's decision not to hold such a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment 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