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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

October 3, 2023

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Clerk of Circuit Court
Milwaukee County Safety Building
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You are hereby notified that the Court has entered the following opinion and order:

2023AP139-CR State of Wisconsin v. Antonio Cresenico Velez
(L.C. # 2019CF828)

Before White, 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).

Antonio Cresenico Velez appeals his judgment of conviction for attempting to flee an officer and second-degree recklessly endangering safety, as well as the order denying his postconviction motion. Velez argues that his trial counsel was ineffective for advising him not to testify at 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(1) (2021-22).[1] We summarily affirm.

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

The charges against Velez stemmed from an incident that occurred in February 2019. Officers from the Milwaukee Police Department attempted to pull over a blue Infinity after seeing Velez's brother, who was wanted, inside the vehicle. Several of the officers were familiar with both Velez and his brother, and observed that Velez was driving the Infinity.

When the officers activated the squad's lights and siren to conduct the traffic stop, the Infinity did not pull over, but rather fled at a high rate of speed. It disregarded a traffic signal and traveled into oncoming traffic. The pursuit lasted for over four miles, with the Infinity reaching speeds of eighty miles per hour on city streets.

The officers lost sight of the Infinity for a short time, but then located it on South 24th Street, unoccupied. Officers in another squad responding to the scene observed four males getting into a white Mitsubishi, and one of the officers recognized Velez. Those officers conducted a traffic stop of the Mitsubishi, and Velez was arrested and charged with attempting to flee an officer and second-degree recklessly endangering safety. During his custodial interview with police, Velez claimed that he was not driving the Infinity during the pursuit.

The matter proceeded to trial in March 2022. Several of the officers involved in the pursuit testified about the incident and identified Velez as the driver of the Infinity. Other officers testified that the Infinity was registered to the mother of Velez's child, and that Velez was known to have driven the Infinity on prior occasions.

The defense presented no witnesses. The circuit court engaged in a colloquy with Velez regarding his right to testify, and confirmed that he had fully discussed the advantages and disadvantages of testifying with his trial counsel. The court also confirmed this with counsel,

and then again with Velez, before finding that Velez had "freely, voluntarily and intelligently" waived his right to testify.

The jury found Velez guilty of both counts. Velez was sentenced to a total of four years of imprisonment, bifurcated as two years of initial confinement followed by two years of extended supervision, to run consecutively with any other sentence he was serving.

Velez filed a postconviction motion claiming ineffective assistance by his trial counsel. Velez alleged that he told counsel that he wanted to testify consistent with his custodial statement, but that counsel had advised against it, stating that his testimony "would not matter" and that he would "mess up" while testifying. Velez asserted that his testimony "could have been useful to bolster the credibility" of his closing argument, which focused on the identity of the driver of the Infinity during the pursuit.

The circuit court rejected Velez's claim, finding it speculative. It further found that even if it were assumed that trial counsel was deficient, Velez had not demonstrated that he was prejudiced, noting the strength of the State's case. In particular, the court referenced the eye-witness testimony of the officers that Velez was the driver, and the evidence that the Infinity was registered to the mother of his child and that he was known to have previously driven it. The court also pointed out that Velez had been advised on the first day of trial that if he testified, he would be asked about his prior convictions, allowing the State the opportunity for impeachment.

Therefore, the circuit court denied Velez's postconviction motion without holding a hearing. Velez appeals.

To prove ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant "must prevail on both parts of the test to be afforded relief." ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. We review *de novo* "the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111 (citation omitted). However, "[a] court need not address both components of this inquiry if the defendant does not make a sufficient showing on one." ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854.

A claim of ineffective representation requires that a postconviction evidentiary hearing be held "to preserve the testimony of trial counsel." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a defendant is not automatically entitled to an evidentiary hearing relating to his or her postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Rather, the trial court is required to hold an evidentiary hearing only if the defendant has alleged "sufficient material facts that, if true, would entitle the defendant to relief." ***Allen***, 274 Wis. 2d 568, ¶14. This is a question of law that we review *de novo*. ***Id.***, ¶9.

If, on the other hand, the 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 either grant or deny a hearing. ***Id.*** We will uphold such a discretionary decision if the circuit

court "has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." ***Bentley***, 201 Wis. 2d at 318.

We conclude that Velez's allegations in his motion are not sufficiently pled. His assertions that his testimony could have bolstered the credibility of his defense—that he was not the driver of the Infinity during the pursuit—are speculative and conclusory. *See* ***Allen***, 274 Wis. 2d 568, ¶9; ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126 ("A defendant must base a challenge to counsel's representation on more than speculation.").

Furthermore, Velez fails to satisfy the prejudice prong of ***Strickland***, particularly when considered in conjunction with the evidence presented by the State. To demonstrate prejudice, the 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 confidence in the outcome." ***Strickland***, 466 U.S. at 694. However, a defendant "cannot meet this burden by simply showing that an error had some conceivable effect on the outcome." ***State v. Koller***, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838. Rather, establishing prejudice "means showing that counsel's alleged errors actually had some adverse effect on the defense." ***Id.***

The State presented a strong case against Velez, including the testimony from the police officers who identified Velez as the driver of the Infinity during the pursuit, as well as the evidence tying Velez to that vehicle. Velez's argument that his testimony "could have been useful" to bolster the credibility of his defense—that he was not the driver of the Infinity—does not demonstrate that there is a reasonable probability of a different outcome had he testified at trial. *See* ***Strickland***, 466 U.S. at 694.

Therefore, as Velez's ineffective assistance of counsel claim fails, the circuit court did not erroneously exercise its discretion by denying his postconviction motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Accordingly, we affirm.

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.

Samuel A. Christensen
Clerk of Court of Appeals