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DISTRICT I

October 8, 2024

To:

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

2021AP1489-CR State of Wisconsin v. Dwayne Lazra Worthy
(L.C. # 2018CF5922)

Before Donald, P.J., Geenen and Colón, 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).

Dwayne Lazra Worthy appeals a judgment, entered upon a jury's verdict, convicting him of two counts of first-degree sexual assault of a child. He also appeals an order denying his motion for postconviction relief. He alleges that the evidence was insufficient to sustain his convictions, the circuit court erred by allowing the State to amend the information on the day of trial, and his trial counsel was ineffective in multiple ways. Based upon a 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.

The State filed a criminal complaint in December 2018, alleging that Worthy sexually assaulted his young relative, Liza.[2] According to the complaint, Liza, then eight years old, reported that in November 2018, she was visiting at Worthy's home when he "put his private part in her butt." Liza also reported that on an earlier occasion, when she was seven years old, she was visiting at Worthy's home when he pulled down her pants and touched her private part with his fingers. Following a preliminary examination, the State filed an information charging Worthy with one count of first-degree sexual assault of a child, specifically, sexual intercourse with a child younger than twelve years of age, in violation of WIS. STAT. § 948.02(1)(b).

Trial began on May 28, 2019. At the start of the proceedings, the State moved to amend the information to add a second count of first-degree sexual assault of a child, specifically, sexual contact with a child younger than thirteen years of age, in violation of WIS. STAT. § 948.02(1)(e). The circuit court granted the motion over Worthy's objection, and the State proceeded on both charges.

Only a limited review of the evidence is required for purposes of this appeal. Lynn Cook, a forensic examiner, testified that she interviewed Liza in December 2018, and the State then presented the video of that interview to the jury. During the interview, Liza said that Worthy called

[1] Worthy committed the offenses at issue in this case when the 2017-18 statutes were in effect. The portions of those statutes relevant to this appeal are materially unchanged in the current, 2021-22 version, and therefore all subsequent references to the Wisconsin Statutes are to the 2021-22 version.

[2] In light of the policy expressed in WIS. STAT. RULE 809.86, and the provisions of WIS. STAT. RULE 809.19(1)(g) and WIS. STAT. § 950.02(4)(a)2., we refer to the victim by the pseudonym "Liza," and we also use a pseudonym when referring to a juvenile witness in the case.

her into his bedroom while she was visiting at his home and gave her his cellphone to watch videos. He told her to get in his bed, and he lay down behind her. Then he pulled down her pants, "stuck his private part in [her] butt," and was "[m]oving ... in and out." Cook asked Liza if Worthy ever did anything else to her body, and Liza said that Worthy "touched the front of [her]" on her "private" with "his fingers." Liza said that the sexual touching occurred before the anal assault, at the same location but on a different day.

Liza testified and told the jury that she was eight years old. She described how Worthy had put his penis in her anus during a visit to his home, and she described later disclosing the assault when visiting her twelve-year-old aunt, Patty. Liza said that her parents then took her to the hospital where she had a physical examination, and that she talked to a forensic examiner a few days later. Liza testified that she did not remember telling the examiner about any sexual contact other than the anal assault nor did she recall another sexual assault.

Patty and her fifteen-year-old brother both testified for the State. They said that when Liza was at their home shortly after Thanksgiving, she disclosed that Worthy had "put his private part in her butt," and they described the steps that they took in response to her disclosure. Liza's mother testified that she took Liza to a hospital emergency room after learning about the assault and that medical personnel then referred Liza for further evaluations.

Worthy's wife, Shakayla Worthy, testified for the defense. She told the jury that she and Worthy lived in a small apartment with her mother, Debra Dotson, and that Dotson rarely left the apartment. Shakayla said that she frequently babysat for Liza, who would spend the night at the Worthy's home. Shakayla further testified that Worthy worked long hours, and when he was at home he was never alone with Liza because either Shakayla or Dotson was in the apartment.

Dotson testified for the defense and agreed with Shakayla that Liza was never alone with Worthy in the apartment. Worthy testified on his own behalf and denied the allegations against him.

The jury found Worthy guilty as charged, and he moved for postconviction relief. He alleged that his trial counsel was ineffective for failing to: (1) request an *in camera* review of Liza's mental health and school records; (2) move to present evidence that a third party committed the sexual assaults; (3) cross-examine Liza about statements that Dotson ascribed to Liza when police interviewed Dotson about the assault allegations; and (4) retain an expert to review the forensic interview that Cook conducted. The circuit court denied the motion without a hearing.

Worthy appeals. He challenges the sufficiency of the evidence and the circuit court's exercise of discretion in permitting an amendment to the information, and he renews the claims of ineffective assistance of counsel that he raised in his postconviction motion.

We begin with Worthy's claim that the evidence was insufficient to support either of the two convictions. Whether evidence was sufficient is a question of law that we review *de novo*. ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. Our review is "highly deferential." ***State v. Rowan***, 2012 WI 60, ¶26, 341 Wis. 2d 281, 814 N.W.2d 854. We may not reverse a criminal conviction for allegedly insufficient evidence "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The jury, not this court, has the duty "to resolve any conflicts or inconsistencies in the evidence and to judge the credibility of the evidence." ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684. We will not disturb the

jury's findings unless "the evidence is inherently or patently incredible." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995).

To prove that Worthy committed first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1)(b), the State was required to prove beyond a reasonable doubt that he had sexual intercourse with Liza and that she was younger than twelve years old at the time. *See* ***id.***; *see also* WIS JI—CRIMINAL 2102B. Liza's testimony and her forensic interview described facts supporting both elements of the crime. Worthy argues, however, that Liza's allegations were incredible "because of the lack of opportunity for Worthy to abuse her," and because she spoke to "several individuals prior to her forensic interview," so her allegations "had the opportunity to go through many revisions." These arguments are unavailing.

A witness's testimony is not incredible as a matter of law unless "it is 'in conflict with the uniform course of nature or with fully established or conceded facts.'" ***Haskins v. State***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980) (citation omitted). Liza did not describe events that conflicted with either the laws of nature or uncontested facts. Accordingly, we reject the claim that the evidence presented here was insufficient to find Worthy guilty of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1)(b).

We also reject Worthy's challenge to the sufficiency of the evidence supporting the conviction for first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1)(e). Before the jury could convict Worthy of that crime, the State was required to prove beyond a reasonable doubt that Worthy had sexual contact with Liza and that she was younger than thirteen years old at the time. *See* ***id.***; *see also* WIS JI—CRIMINAL 2102E. The State relied on Liza's

forensic interview, where she revealed that Worthy had "touched the front of [her]" on her "private" with "his fingers."

Worthy emphasizes that Liza did not recall an incident of hand-to-genitalia sexual contact when she testified at trial, and he asserts that "the allegation is not supported by any of the testimony presented by either the State or Defense." He fails, however, to offer any argument grounded in law or fact as to why Liza's forensic interview was insufficient to support his conviction under WIS. STAT. § 948.02(1)(e). As the circuit court explained in response to Worthy's mid-trial motion to dismiss, the recorded interview was a trial exhibit properly admitted into evidence pursuant to WIS. STAT. § 908.08(2)-(3). Accordingly, the statements that Liza made during that interview could be used as proof to whatever extent they may have had rational persuasive power. ***State v. Snider***, 2003 WI App 172, ¶¶5, 12-13, 266 Wis. 2d 830, 668 N.W.2d 784; ***Schlichting v. Schlichting***, 15 Wis. 2d 147, 160, 112 N.W.2d 149 (1961).

The jury was thus entitled to find Liza's recorded statements persuasive and to believe Liza when she told the forensic interviewer about a sexual assault involving touching. The jury was also entitled to believe Liza when she later testified that she no longer remembered that assault. As Wisconsin courts have long recognized, "[a] young child may be unable or unwilling to remember (as here) all the specific details of the assault by the time the case is brought to trial[.]" ***Bertrang v. State***, 50 Wis. 2d 702, 707-08, 184 N.W.2d 867 (1971). The limitations of a child's memory therefore do not render the original disclosure inherently incredible. Rather, such limitations are the foundation for allowing the fact-finder to hear about the child's earlier statements, as occurred here. *See* ***id.*** Moreover, a fact-finder is not required to discount a victim's statement merely because it is uncorroborated. A victim's testimony alone is sufficient to support

a criminal conviction. ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1024, 480 N.W.2d 842 (Ct. App. 1992). In sum, we see no basis to disturb the jury's findings.

Worthy next alleges that the circuit court erred by permitting the State to amend the information on the day of trial to add the charge that he touched Liza's genitals with his hand in violation of WIS. STAT. § 948.02(1)(e). Whether to allow amendment of an information is a matter within the circuit court's discretion, and "[w]e will not reverse the [circuit] court's decision to allow an amendment absent an erroneous exercise of discretion." ***State v. Frey***, 178 Wis. 2d 729, 734, 505 N.W.2d 786 (Ct. App. 1993). Reversal is unwarranted here.

WISCONSIN STAT. § 971.29 permits an amendment before trial if the amendment does not prejudice the defendant's rights. ***State v. Webster***, 196 Wis. 2d 308, 318, 538 N.W.2d 810 (Ct. App. 1995). "The key factor in determining whether an amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations against him. There is no prejudice when the defendant has such notice." ***State v. Flakes***, 140 Wis. 2d 411, 419, 410 N.W.2d 614 (Ct. App. 1987) (citation omitted). In this case, the allegation of sexual touching is in the criminal complaint. Worthy therefore concedes, as he must, that he had notice of the allegation of sexual touching "well in advance of trial." Worthy nonetheless argues that he was prejudiced by the amendment for two reasons. Neither reason is persuasive.

First, Worthy asserts prejudice because he faced additional punishment if convicted of the second charge. Increased potential punishment, however, does not demonstrate unfair prejudice because a defendant may be "charged with as many counts as the [S]tate can make a case for[.]" ***State v. Wickstrom***, 118 Wis. 2d 339, 348-49, 348 N.W.2d 183 (Ct. App. 1984); *see also* ***Roehl v. State***, 77 Wis. 2d 398, 410-11, 253 N.W.2d 210 (1977). Second, Worthy asserts prejudice because

the jury was more likely to convict him upon hearing about "two horrible things" rather than just one. Worthy fails to explain why this conclusory assertion, even if true, bars the amendment. The key factor is notice, and the question is therefore whether the notice he received was sufficient to permit him to prepare for and defend against the second charge. ***State v. Neudorff***, 170 Wis. 2d 608, 617, 489 N.W.2d 689 (Ct. App. 1992). Given Worthy's concession that he had notice "well in advance of trial," his challenge necessarily fails.[3]

We turn to Worthy's claims that his trial counsel was ineffective. 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. ***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 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Although a defendant who alleges ineffective assistance of counsel cannot prevail absent either the State's concession or a postconviction hearing at which counsel testifies, ***State v. Howard***, 2001 WI App 137, ¶¶28-29, 246 Wis. 2d 475, 630 N.W.2d 244, a defendant pursuing a disputed claim is not automatically entitled to such a hearing. Rather, the circuit court is required

[3] As the circuit court noted when it overruled Worthy's objection to the amended information, not only did the December 2018 criminal complaint alert Worthy to a potential second charge but, in addition, the State filed an amended information that included the second charge several months before the May 28, 2019 trial. The record shows that at a pretrial conference on March 5, 2019, the clerk advised that an amended information was in the court's electronic queue. However, defense counsel requested another pretrial conference and agreed that the amended information could be addressed at that future hearing. The circuit court conducted the next pretrial conference off the record on March 14, 2019. The amended information, reflecting both charges, was file-stamped the next day. Thus, although the circuit court did not grant the State's request to proceed on the second charge until the day of trial, the record reflects that Worthy had notice of a second charge long before trial began.

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. Whether a postconviction motion alleges sufficient material facts is a question of law that we review *de novo*. ***Id.***, ¶9. 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." ***Id.***, ¶23. If, however, a 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. ***Id.***, ¶9. We review a circuit court's discretionary decisions with deference. ***Id.*** We are satisfied that the circuit court properly denied Worthy's claims without a hearing here.

Worthy first alleged that his trial counsel was ineffective for failing to move for an *in camera* review of Liza's mental health records pursuant to ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) and ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. However, our supreme court overruled both cases in ***State v. Johnson***, 2023 WI 39, ¶1, 407 Wis. 2d 195, 990 N.W.2d 174, and the *in camera* review process for privileged health care records is thus no longer available. ***Id.***, ¶47. ***Johnson*** states a new rule of criminal procedure that applies retroactively to a case like this one that is on direct review. *See* ***State v. Lagundoye***, 2004 WI 4, ¶12, 268 Wis. 2d 77, 674 N.W.2d 526. Accordingly, Worthy's claim for postconviction relief based on ***Shiffra*** and ***Green*** is moot. *See* ***State v. Barfell***, 2010 WI 61, ¶9, 324 Wis. 2d 374, 782 N.W.2d 437 (reflecting that an issue is moot when its resolution will have no practical effect). We normally do not consider moot issues, ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425, and we see no reason to do so here.

Worthy next alleged that his trial counsel was ineffective for failing to seek disclosure of Liza's school records. As the State points out, a statutory process exists for obtaining school records, *see* WIS. STAT. § 118.125(2)(f), and the proponent must make a showing that the records contain relevant information, *see* ***State v. Echols***, 2013 WI App 58, ¶¶17-22, 348 Wis. 2d 81, 831 N.W.2d 768. Worthy thus could not prevail on a claim that his trial counsel was ineffective for failing to pursue Liza's school records unless he demonstrated in his postconviction motion that his trial counsel could have made the showing necessary to obtain those records. *See* ***Allen***, 274 Wis. 2d 568, ¶23. Here, Worthy relied solely on a statement that Dotson made to police, specifically, that Liza "had been having problems in school." We agree with the State that this vague assertion failed to demonstrate that Liza's school records contained information bearing on this case. Moreover, Worthy's reply brief does not include any response to the State's arguments regarding this issue. We treat his silence as a concession and do not discuss the issue further. ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578.

Worthy next alleged that his trial counsel was ineffective for failing to move for leave to introduce evidence that a third party committed the sexual assaults described in the complaint. *See* ***State v. Denny***, 120 Wis. 2d 614, 623-24, 357 N.W.2d 12 (Ct. App. 1984). To prevail on a ***Denny*** motion, "the defendant must show 'a legitimate tendency' that the third party ... had motive, opportunity, and a direct connection to the crime." ***State v. Wilson***, 2015 WI 48, ¶3, 362 Wis. 2d 193, 864 N.W.2d 52 (citation omitted). An offer of proof is insufficient if it merely "'affords a possible ground of suspicion against another person[.]'" ***Id.***, ¶51 (citation omitted).

Worthy argues that his trial counsel had grounds for a ***Denny*** motion based on another statement that Dotson gave to police, specifically, Dotson's report that when she spoke to Liza about her allegations of sexual assault, Liza said that "her grandfather's friend touched her

buttocks." According to Worthy, this allegation warranted a ***Denny*** motion because there was no physical evidence against him and no witnesses other than Liza who accused him of sexual assault. Therefore, "[t]he evidence against [him] was no stronger than that against the grandfather's friend." Worthy, however, failed to show that Dotson's report about Liza's "grandfather's friend" demonstrated: (1) the existence of a person with a motive to commit the sexual assaults charged here; or (2) that such a person had an opportunity to commit those assaults; or (3) a legitimate tendency to connect such a person to the penis-to-anus and hand-to-vagina assaults underpinning the charges alleged in the complaint. Indeed, Worthy did not suggest an identity for the alleged third-party perpetrator. Thus, the allegation that Dotson reported provides at most "a possible ground of suspicion against" an unidentified person, which is insufficient to sustain a ***Denny*** motion. ***Wilson***, 362 Wis. 2d 193, ¶83.

Accordingly, Worthy failed to make a showing that his trial counsel performed deficiently by forgoing a ***Denny*** motion. An attorney does not perform deficiently by failing to file a motion that would have been denied. ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

Because Worthy did not satisfy the deficiency prong of his claim that trial counsel was ineffective for failing to file a ***Denny*** motion, we need not consider prejudice. ***Strickland***, 466 U.S. at 697. For the sake of completeness, however, we note that we agree with the State that Worthy also failed to satisfy that prong. As the State explains:

> Liza testified very coherently and in great detail about what happened the day she was anally assaulted by Worthy.... In contrast, [Dotson's] account is a vague statement [that] Liza told [Dotson] that [Liza's] grandfather's friend touched her buttocks. That has nothing to do with the anal assault Liza contended Worthy

> perpetrated.... [E]ven if the jury believed it, it would not cast doubt on Worthy's guilt of this assault.

Next, Worthy argues that his trial counsel was ineffective for failing to cross-examine Liza about two additional statements ascribed to her in Dotson's report to police: (a) Liza had a dream that someone touched her; and (b) Liza did not know who touched her. A defendant claiming that trial counsel was ineffective for failing to present witness testimony must allege with specificity what the witness would have said. ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647. Worthy does not present any material facts showing how Liza would have responded to the cross-examination that he claims should have occurred. To be sure, he posits two possible responses—Liza would have admitted making the statements, or Liza would have denied making the statements—but these opposing possibilities clearly do not allege with specificity what she would have said, nor are they in the universe of possible responses that the cross-examination might have elicited.[4] Accordingly, Worthy's allegations failed to satisfy the deficient performance prong of ***Strickland***. *See* ***Arredondo***, 269 Wis. 2d 369, ¶40.

Moreover, Worthy failed to demonstrate prejudice from the alleged deficiency. He argues that the cross-examination would "bring direct doubt to the credibility of [Liza's] statements" accusing Worthy of sexual assault, but absent a specific showing of how Liza would have responded to the cross-examination, its potential effect is entirely speculative.

Finally, Worthy alleged that his trial counsel was ineffective for failing to retain an expert to review Liza's forensic interview. Worthy's postconviction motion, however, failed to identify who his trial counsel should have retained as an expert, what that expert would have said, and how

[4] For example, Liza might have testified that she did not remember making the statements.

and why the expert would have been helpful. His conclusory claim that an unidentified expert would have assisted him in some unspecified way is insufficient to warrant a postconviction hearing. ***Allen***, 274 Wis. 2d 568, ¶24.

For all the foregoing reasons,

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