STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2672

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY D. WRIGHT,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
JEFFREY A. WAGNER, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this case involves only the application of settled law to the facts of this case.

ARGUMENT

Wright's postconviction motion failed to make a sufficient showing to warrant a hearing on his claims that his trial and postconviction attorneys were ineffective.

An evidentiary hearing is not required if the motion presented by the defendant does not allege facts sufficient to warrant relief, or if the record conclusively shows that the defendant is not entitled to relief. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Allen*, 2004 WI 106, ¶ 15, 274 Wis. 2d 568, 682 N.W.2d 433.

When a postconviction motion is based on a claim of ineffective assistance of counsel, the two part test established by *Strickland v. Washington*, 466 U.S. 668 (1984), is applied to determine whether the defendant has stated a claim that would warrant relief. *Allen*, 274 Wis. 2d 568, ¶¶ 14, 18, 26.

Conclusory complaints about counsel are not enough. *Balliette*, 336 Wis. 2d 358, ¶ 68; *Allen*, 274 Wis. 2d 568, ¶ 15; *Levesque v. State*, 63 Wis. 2d 412, 421, 217 N.W.2d 317 (1974). To be entitled to a hearing, the defendant must elaborate how and why counsel failed, and how and why that failure prejudiced him. *See Balliette*, 336 Wis. 2d 358, ¶¶ 65, 68, 70; *Allen*, 274 Wis. 2d 568, ¶¶ 18-24, 29-33.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Allen*, 274 Wis. 2d 568, ¶ 26; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212,

¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

To prove that his attorney's performance was deficient the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217.

Deficient performance is prejudicial when it is so reasonably probable that the result of the proceeding would have been different without the error that a court cannot have confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

It is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). When the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

To prove that postconviction counsel was ineffective for failing to argue that trial counsel was ineffective, a defendant must establish that trial counsel was actually ineffective under this test. *State v. Ziebart*, 2003 WI App 258, ¶ 15, 268 Wis. 2d 468, 673 N.W.2d 369.

On appeal the circuit court's findings of fact will be upheld unless they are clearly erroneous. *Balliette*, 336 Wis. 2d 358, ¶ 19; *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). *See Thiel*, 264 Wis. 2d 571, ¶ 23. Findings are clearly erroneous when they are contrary to the great weight and clear preponderance of the credible evidence supporting a different finding. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983).

Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶ 23.

A. Wright failed to make even a minimal showing that his trial attorney was ineffective for failing to investigate.

The police report written by Detective Lucretia Thomas (65:attch.A, A-Ap:001) was a subject of dispute in this case.

Detective Thomas was investigating a claim that the defendant-appellant, Larry D. Wright, had sex with a young black girl, SF, at the Oakwood Motel on May 18, 2009 (65:attch.A:2, A-Ap:001:2).

In her report, Det. Thomas wrote that she asked the manager of the motel, Rada Prpa, if anyone had checked in within the previous few days under the name Larry Wright (65:attch.A:2, A-Ap:001:2). Prpa initially said no (65:attch.A:2,

A-Ap:001:2). Prpa thought she recognized a photo of Wright, but was not certain (65:attch.A:2, A-Ap:001:2).

Detective Thomas wrote that when she told Prpa that Wright probably stayed in room 2, Prpa looked through a stack of registration cards and found one indicating that Wright had stayed in room 2 on May 17, 2009 (65:attch.A:2, A-Ap:001:2). On further searching, Prpa retrieved a second card with Wright's name on it dated May 18, 2009 (65:attch.A:2, A-Ap:001:2).

Detective Thomas wrote that she asked Prpa if Prpa had seen a girl with Wright, and that Prpa replied she had seen a thin white girl bring in Wright's identification for him (65:attch.A:2, A-Ap:001:2).

The report further states that Prpa said she checked Wright in on his second night there, i.e., May 18, and that her husband told her Wright was there the night before as well (65:attch.A:2, A-Ap:001:2).

At the trial, Prpa, speaking through a Serbian interpreter, testified that she filled out the registration card for May 18 (51:78-79, 84, 86, 107).

Prpa also testified that she did not remember telling the police a thin white girl was with Wright, and that she thought a male, not a skinny white girl, gave her Wright's driver's license (51:90, 92).

For the most part, Det. Thomas' testimony at the trial tracked the narrative in her report (51:96-108).

However, Det. Thomas testified that when Prpa told her Wright was at the motel with a white girl, she understood Prpa to be saying that Wright was there with a white girl on May 17

(51:108-09). Thomas stated she did not think this testimony was inconsistent with her report, which she understood to reflect that Prpa said she saw a white girl with Wright on the 17th but did not see any girl with him on the 18th (52:13, 18-19).

Against this background, Wright asserts that his trial attorney was ineffective for failing to obtain Det. Thomas' memo book or notes.

But Wright has never demonstrated that Det. Thomas had any memos or notes about this case in addition to her report. No such documents were provided pursuant to the defense discovery demand (65, A-Ap (Attorney Marola's letter to Wright)), indicating that there were no such documents.

Moreover, Wright has never suggested what might have been written in such memos or notes, even if any such memos or notes actually existed. He has never suggested that any memos or notes might have stated anything different from Det. Thomas' report, which presumably would have been based on any such memos or notes. Wright does not discount the possibility that any memos or notes might have specifically stated that Prpa told Thomas the night Wright was with a white girl was May 17, not May 18.

Since Wright does not even suggest what might have been written in any memos or notes, he does not undertake to explain how something that might have been written there could have possibly changed the result of his trial.

Thus, Wright has not even begun to show that he might have been prejudiced in any way by his attorney's failure to obtain any memo book or notes that might have been written by Det. Thomas.

Next, Wright faults his trial attorney for not interviewing Prpa's husband.

But again, Wright is silent on what Prpa's husband would have told his attorney in any interview.

Since Wright told his attorney and continues to maintain that Prpa checked him in both nights he was at the motel (65, A-Ap (Attorney Marola's letter to Wright)), Brief for Defendant-Appellant at 12-14, there is reason to question whether Prpa's husband would have been able to provide any relevant information.

A defense attorney's duty to investigate depends in large part on the information given to him by the defendant. *Strickland*, 466 U.S. at 691. "And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691.

Wright speculates that if Prpa's husband might have told his attorney that he did not check Wright in either night Wright stayed at the motel, any such evidence would have refuted Det. Thomas' conflicting testimony and supported his "alibi" defense that he was at the motel with a white girl rather than the black victim on May 18. Brief for Defendant-Appellant at 14.

But Det. Thomas did not really testify as a matter of fact that Prpa's husband checked Wright in on May 17.

Thomas testified, consistent with her report, that Prpa said her husband had told her that Wright was there the previous night, i.e., May 17 (51:109). The report did not say anything about who checked Wright in on May 17.

Asked on cross-examination whether her report stated that there was no female with Wright the second night, i.e., May 18, Thomas said that although Prpa told her that a white female brought in Wright's identification, Thomas' "understanding was that that was the previous night that her husband had checked him in" (52:18). So Thomas simply drew an unresponsive inference that Prpa's husband checked Wright in the previous night based on her understanding of what she had been told by Prpa.

Any information that might have been provided by Prpa's husband that he did not check Wright in on May 17 would have shown that the inference drawn by Thomas was incorrect. Indeed, the comment Prpa's husband reportedly made about Wright being at the motel the previous night had nothing to do with who checked Wright in that night or any other. Prpa's husband could have simply been remarking that the man Prpa checked in on May 18 was the same man she had also checked in the night before, i.e., May 17.

However, the mere fact that Det. Thomas might have drawn an incorrect inference from the historical facts about which she testified would not have raised any questions about the credibility of any of those facts.

More importantly, any evidence that Prpa's husband did not check Wright in on May 17 would have deflated, not supported, Wright's alleged defense.

If Prpa's husband checked Wright in on May 17, while Prpa checked him in on May 18, that sequence could have tended to support a claim that Prpa saw Wright with a thin white female on May 18 because that was the only night she checked him in.

But if Prpa checked Wright in on both May 17 and 18, she could have seen Wright with a thin white female on either one of those nights, not necessarily on May 18. And if Prpa saw Wright with a white girl on May 17, his defense that he was with a white girl rather than the black victim on May 18 would have been disintegrated.

Wright does not explain how evidence showing that he could have been with a white girl on May 17 and with a black girl on May 18 would convince a jury that he was not with the victim on May 18, the day she said she had sex with him. Wright does not explain how evidence showing that he had an opportunity to have sex with the victim at the time and place she said there was sex could have changed the result of his trial.

Thus, Wright has not shown either how his attorney performed deficiently by declining to interview Prpa's husband, or how he could have been prejudiced by his attorney's declination to interview Prpa's husband.

The only thing Wright succeeds in accomplishing with his argument regarding Prpa's husband is to cast doubt on the reliability of his own statements by asserting that his attorney should have interviewed the man "to determine whether Wright in fact was correct." Brief for Defendant-Appellant at 14.

Finally, Wright asserts that his attorney should have had an expert compare the handwriting on both motel registration cards to determine whether they matched, which would have confirmed Wright's contention that Prpa checked him in both nights. Brief for Defendant-Appellant at 14.

But this argument suffers from the same problem of prejudice as the previous one. If Prpa checked Wright in on

May 17, she could have seen him with a white girl on May 17 rather than May 18.

There was no reason to hold an evidentiary hearing on Wright's completely meritless assertions that his trial attorney was ineffective for failing to investigate.

B. Wright failed to make even a minimal showing that his trial attorney might have been ineffective for failing to raise any claims regarding the jury's request to see an exhibit.

Wright asserts that his trial attorney was ineffective in several respects regarding the jury's request to see Det. Thomas' report, which had been received in evidence as Exhibit 28 (52:20, 22).

First, Wright appears to assert that his attorney was ineffective for failing to object that Wright was not present when the jurors contacted the bailiffs regarding their request. But Wright fails to explain why he might have had any right to be present at that time.

A defendant has a right to be present whenever the court takes any substantive step in his case. *State v. Anderson*, 2006 WI 77, ¶¶ 38-42, 291 Wis. 2d 673, 717 N.W.2d 74 *modified by*, *State v. Alexander*, 2013 WI 70, ¶ 28, 349 Wis. 2d 327, 833 N.W.2d 126 (quoting *Williams v. State*, 40 Wis. 2d 154, 160, 161 N.W.2d 218 (1968)). And although a court's communication with the jury during its deliberations may be such a substantive step, *Anderson*, 291 Wis. 2d 673, ¶¶ 42-43, a mere procedural act such as adjourning the case to another date is not. *Williams*, 40 Wis. 2d at 160-61.

A bailiff's purely ministerial act of taking a note from the jury to transmit it to the court cannot reasonably be considered a substantive step in the case. Wright does not suggest any logical reason why he needed to be present when the jury handed the bailiff its note.

The bailiff's purely ministerial act of taking the note from the jury to give it to the court was not a prohibited ex parte communication.

A "communication" is a means of transmitting information, ideas or messages. The American Heritage Dictionary of the English Language 383 (3d ed. 1996); Black's Law Dictionary 337 (10th ed. 2014); Webster's Third New International Dictionary 460 (unabridged ed. 1986).

Here, it was the jury that was communicating to the court by sending a note saying that it wanted to see a particular exhibit. Just carrying the note from the jury to the court did not communicate anything to anybody, certainly not to the jury that wrote the note.

When attempting to show that an attorney performed deficiently by failing to object, the defendant must establish that there was a reason to object. *See State v. Ewing*, 2005 WI App 206, ¶ 18, 287 Wis. 2d 327, 704 N.W.2d 405. Wright has no basis to complain that his attorney failed to object to something that was in no way objectionable.

Wright does not explain how he could have possibly been prejudiced by his attorney's failure to object to not being contacted when the jury asked for the exhibit.

The court and both parties agreed that the jury would be given any exhibit they requested without the need for any further discussion about providing any particular exhibit (54:9-

12). So if the jury asked to see Det. Thomas' report it would be sent back to them (54:10).

The attorneys wanted to be notified if the jury asked for an exhibit just so they knew what the jury was asking for (54:11-12).

Wright does not explain how the result of his trial could have possibly been any different if only his attorney's curiosity had been satisfied by knowing that the report had been requested.

Finally, Wright faults his attorney for failing to complain that the report was never actually sent to the jury.

But Wright fails to even begin to meet his burden to show prejudice from his attorney's failure to complain by failing to show that the report was not sent to the jury. If anything, the record suggests that the jury received the exhibit.

The record shows that a bailiff took the jury's note requesting the exhibit and gave it to the deputy clerk of the court for Branch 27, i.e., the branch where Wright was being tried, who file stamped it as received the same day it was dated (65:attch.C, A-Ap:003).

Pursuant to the court's decision, the clerk was supposed to send the exhibit to the jury on receipt of its request (54:12). It is presumed that public officials properly discharge their duties. *Banks v. Dretke*, 540 U.S. 668, 696 (2004). So it is presumed that the clerk sent Det. Thomas' report to the jury as it requested.

It can also be inferred that if the jury did not get the report it requested, it would have sent another note to the court inquiring why it had not been given the exhibit.

Moreover, when the question was raised in the circuit court, Wright's attorney advised the court that Wright told him that he had been told by one of the bailiffs that the exhibit had gone back to the jury (55:15). Wright was present at the time (55:1), but said nothing to dispute his attorney's statement about what he had said.

If a statement is made in the presence of the defendant which the defendant would ordinarily deny if it were not true, and he does not deny it, he forgoes any opportunity to subsequently dispute the statement. *State v. Alles*, 106 Wis. 2d 368, 379 n.3, 316 N.W.2d 378 (1982); *Caccitolo v. State*, 69 Wis. 2d 102, 110, 230 N.W.2d 139 (1975). *See* Wis. Stat. § 908.01(4)(b)2. (2013-14) (when party has manifested belief in truth of statement, statement not hearsay).

Too late, Wright now tries to dispute a fact that has already been established against him. But his current assertion that "he did not inform Attorney Marola that he spoke with a *female bailiff* and *she* informed him that the statement had been provided," Brief for Defendant-Appellant at 18-19 (emphasis added), is not only too late but also too little because it does not deny that a male bailiff, or even someone who was not a bailiff, told Wright that the report had been provided to the jury.

In any event, even if the police report never made it back to the jury during its deliberations, Wright fails to show how the result of his trial would have been different if the jury had the exhibit.

Of course, the jury probably thought the report could be helpful or it would not have requested it. But there is no reason to think that the document would have given the jury any information it did not already know.

During his thorough cross-examination of Det. Thomas about the report, Wright's attorney went through it line by line so that the jury was informed of everything Det. Thomas wrote about her interview with the manager of the motel (52:21). The notebooks that the jurors had during the trial, and in which they could have written comments about the cross-examination, were returned to them during their deliberations (49:36; 54:15). Wright points to nothing in the report that would have advised the jury of some previously unknown fact that could have convinced it to reach a different result.

To the contrary, the police report would have reminded the jury that on May 20 the victim, who lived on the Northwest side of Milwaukee, led the police to the Oakwood Motel in the southeast suburb of Oak Creek, identified the place by its red doors, and said she had been there with Wright in room 2 on May 18 (65:attch.A, A-Ap:001). This report would have repeated the critical fact that the victim could not possibly have known that Wright stayed in room 2 of the Oakwood Motel in a particular location she could pick out in Oak Creek on May 18 unless she had been there with him.

Wright has failed on several levels to show how he could have been prejudiced by his attorney's failure to complain that Det. Thomas' report was not sent to the jury.

There was no reason to hold an evidentiary hearing on Wright's completely meritless assertions that his attorney was ineffective for failing to raise any claims regarding the jury's request to see Det. Thomas' report.

CONCLUSION

Wright's postconviction motion failed to make a sufficient showing to warrant a hearing on his claims that his

trial and postconviction attorneys were ineffective. Wright totally failed to show why his postconviction attorney might have been ineffective for failing to raise any completely baseless claims that his trial attorney was ineffective.

It is therefore respectfully submitted that the order of the circuit court denying Wright's motion for postconviction relief should be affirmed.

Dated: April 30, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,716 words.

Dated this 30th day of April, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of April, 2015.

_____

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