STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2605-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. JOHNSON, A/K/A
DAVID ALI SHABAZZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID L. BOROWSKI AND THE HONORABLE JOSEPH M. DONALD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. A defendant is not entitled to a hearing on a postconviction motion alleging ineffective assistance if the motion contains merely conclusory allegations.[1] Here, David Johnson alleged that counsel failed to investigate records of phone calls to support his defense, but he provided no evidence of those calls' content, witnesses who would testify to that content, or how the calls could change the trial outcome.[2] Did the postconviction court soundly exercise its discretion in denying Johnson's claim without a hearing?

2. Under Wisconsin law, a court's imposition of a single $250 DNA surcharge for a felony conviction is not punitive and therefore does not violate ex post facto principles.[3] Here, the postconviction court granted Johnson relief by vacating one of two DNA surcharges that the sentencing court had imposed. Is Johnson entitled to additional relief?

3. To obtain resentencing based on inaccurate information, a defendant must show that the information is inaccurate and

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[1] *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

[2] Although Johnson uses his alternative name (Shabazz) in his brief, the State uses "Johnson" in its brief, given that that is his name in the case caption and the name by which he is registered with the Department of Corrections.

[3] *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146.

that the sentencing court actually relied on it. Here, Johnson's counsel offered several convictions to the PSI at sentencing; the court then sentenced Johnson based on the seriousness of the crimes and Johnson's record of 25 prior convictions, none of which related to the original, allegedly inaccurate PSI information. Did the postconviction court properly conclude that Johnson was not entitled to resentencing?

4. Should this Court grant Johnson a new trial in the interest of justice?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE

K.M. reported to police that on September 27 and September 28, 2012, Johnson held her against her will in his apartment. (2:2.) She reported that he threatened her with a knife; dragged her into his bedroom; forced her to engage in oral, vaginal, and attempted anal intercourse; strangled her with a belt; and repeatedly struck her face and body. (2:2-3.)

Based on K.M.'s allegations, the State charged Johnson with first-degree sexual assault, aggravated battery, false imprisonment, and strangulation/suffocation. (2; 7:1-2.)

During the four-day trial in May 2014,[4] K.M. testified that she had met Johnson at a CVS pharmacy on Monday, September 24, 2012. (105:7-8; A-Ap. 184-85.) At Johnson's request, she agreed to help Johnson clean and pack up his apartment because he was moving. (*Id.* at 10; A-Ap. 187.) K.M. stated that she went to Johnson's apartment at least once before September 27 to help him clean with no incident. (*Id.* at 20.)

K.M. testified that on the evening of Thursday, September 27, Johnson picked her up and drove her to his apartment. (*Id.* at 11.) K.M. admitted to drinking alcohol and smoking crack cocaine at Johnson's apartment while she cooked a meal for him. (*Id.* at 21-23.)

K.M. testified that after she cooked for Johnson, Johnson's mood changed and he threatened her with a knife, hit her, and dragged her into his bedroom. (*Id.* at 25; A-Ap. 192.) Johnson used the back of his hand to hit her; K.M. said that he choked her with his belt and hit her on her face, head, upper body, and legs. (*Id.* at 27-28; A-Ap. 194-95.) K.M. stated that Johnson told her, "I'm going to kill you," and that she started crying and screaming. (*Id.* at 29; A-Ap. 196.) K.M. attempted to break the windows to escape; every time she tried to leave through the door, Johnson pulled her back in the room. (*Id.*)

[4] The Honorable David L. Borowski presided over the trial and sentencing.

K.M. testified that Johnson sexually assaulted her on his bed by forcing her to fellate him, and then forcing vaginal sex, and then alternating between the two acts. (*Id.* at 31-32; A-Ap. 197.) She also claimed that Johnson tried to penetrate her anally. (*Id.* at 75-76.) She claimed that during the attack, Johnson choked her with a belt and hit her until she lost consciousness. (*Id.* at 30, 33-36; A-Ap. 198-201.)

K.M. explained that when she came to, Johnson was asleep in the bedroom, so she put on one of his shirts and ran from the apartment to her house. (*Id.* at 36-37; A-Ap. 201-02.) K.M. left her purse, clothes, and jacket at Johnson's apartment. (*Id*. at 38; A-Ap. 203.)

E.M., K.M.'s husband, testified that at around 3:30 a.m. on September 28, K.M. arrived at the back door of their home, and she was "bloody, [had] black eyes, and [was] falling through the doorway." (106:6; A-Ap. 217.) K.M. testified that E.M. wanted to confront Johnson after she told E.M. what had happened. (105:39-41.) According to K.M., E.M. "was angry. He was angry. What did he look like? Angry. He looked very angry, very upset." (*Id.* at 41.)

K.M. and E.M. drove to Johnson's apartment, where they attempted to get in by ringing several doorbells. (*Id.* at 42.) One of the building tenants then came to the building door and both the tenant and E.M. called police. (*Id.* at 42-44.) E.M. confirmed

that he wanted to confront Johnson for assaulting K.M. (106:7-8; A-Ap. 218-19.) E.M. acknowledged that when he and K.M. got to Johnson's apartment building, E.M. smashed one of Johnson's car windows with a crowbar out of anger. (*Id.* at 9; A-Ap. 220.)

The State also presented testimony from Dorothy Nolden, who lived in the same apartment building as Johnson on September 27 and September 28, 2012. Nolden testified that around 4 a.m. on September 28, she heard a man outside screaming and yelling that he was going to kill someone. (*Id.* at 24; A-Ap. 227.) Nolden testified that she told the man to call 911, and he responded that someone raped his wife. (*Id.*) Nolden saw the man's wife with him, and saw that the wife was crying and bruised up. (*Id.* at 25-26.)

Officer Matthew Waldenmeyer testified that he responded to Johnson's apartment building on September 28. (106:41; A-Ap. 230.) When Officer Waldenmeyer arrived, E.M. was outside and told Officer Waldenmeyer that someone inside the building had beaten and raped his wife. (*Id.* at 42-43.) Office Waldenmeyer also saw K.M. with facial bruises and "sobbing on a picnic table." (*Id.* at 43-44.) K.M. told Waldenmeyer that a man named David Shabazz had raped her inside the apartment building. (*Id.* at 45.)

When the police arrested Johnson in his apartment, they found him naked in his bed. (*Id.* at 52.) Officer Jeffrey Emanuelson testified that he conveyed Johnson to the hospital, where staff collected swabs from Johnson's body. (107:12.) Officer Emanuelson testified that a swab of Johnson's left palm had a dark red substance on it. (*Id.* at 17.)

Margaret Cario, a DNA analyst with the Wisconsin State Crime Lab, testified that K.M.'s blood was identified on the swab taken from Johnson's left palm. (*Id.* at 34.) Cario also confirmed that K.M.'s DNA was found on swabs taken from Johnson's penis, and that Johnson's DNA was also found on swabs taken from K.M.'s breasts. (*Id.* at 40; A-Ap. 239.)

Officer Deb Kranz interviewed K.M. at the hospital. (107:58-59; A-Ap. 246.) Officer Kranz stated that K.M. had numerous injuries, including black and swollen eyes; swelling on her left cheek and mouth; red marks on her neck; bruising on her nose, both hands, and ears; scrapes and bruises on her elbows and arms; scrapes on her back; two broken ribs; and a broken nose. (*Id.* at 66–72.)

Detective Branko Stojsavljevic testified that he executed a search warrant at Johnson's apartment. (108:77.) There, Detective Stojsavljevic collected a crack pipe, K.M.'s jacket and purse, and a black leather belt. (*Id.* at 78, 83, 86.)

Johnson did not testify. His defense was that the physical evidence, or lack thereof, rendered K.M.'s and E.M.'s testimony incredible. (110:82; A-Ap. 278.) Johnson's counsel emphasized that despite K.M.'s claims that Johnson forced her to fellate him, the state crime lab could not identify any of his DNA or skin from a swab of K.M.'s mouth. (110:85.) Counsel also argued that despite K.M.'s claims of violent sexual assault, the State could not link Johnson to anything collected on swabs of K.M.'s vagina, cervix, or anus. (*Id.* at 86.) Counsel pointed out that K.M. did not have neck injuries or bruises consistent with strangulation. (*Id.* at 89; A-Ap. 283.) Counsel also faulted the State for not testing for DNA evidence the bed sheets where K.M. claimed the sexual assaults occurred or the belt that K.M. claimed that Johnson had cinched around her neck. (*Id.* at 92-93; A-Ap. 285.) Counsel also noted that police did not appear to notice or recover K.M.'s clothes from Johnson's apartment. (*Id*.)

The jury found Johnson guilty of aggravated battery and false imprisonment, but acquitted him on the sexual assault and strangulation counts. (109:5-6.)

The court sentenced Johnson to two consecutive six-year sentences, the maximum on each count. (60; A-Ap. 103.) The court noted that the maximum sentence was appropriate "given what this defendant did, given his horrific criminal record, given his total lack of remorse, given his total lack of

character, given just his obstructionism during this case [and] looking at every appropriate factor there is under *Gallion* . . . ." (113:36; A-Ap. 295.) The court also imposed $250 DNA surcharges on each count. (60:2; A-Ap. 104.)

Johnson filed a postconviction motion for a new trial based on ineffective assistance of counsel, arguing that counsel should have researched telephone records and called witnesses to support a defense that K.M. sustained her injuries after leaving his apartment and that she and E.M. returned in the early morning hours because they intended to steal from him. (70:11-17; A-Ap. 124-30.) He sought resentencing, alleging that the court relied on inaccurate information in the PSI in imposing sentence. (70:19-20; A-Ap. 132-33.) Finally, he sought vacation of the DNA surcharges on ex post facto grounds. (70:17-19; A-Ap. 130-32.)

The postconviction court denied Johnson's motion without a hearing.[5] In a written decision and order, it explained that Johnson's motion provided nothing beyond "unsubstantiated, speculative and conclusory submissions" as to what counsel would have discovered in the phone records and how that information could have supported Johnson's new defense theory. (77:4; A-Ap. 109.) The court also denied Johnson's

[5] The Honorable Joseph M. Donald presided over the postconviction matters.

request for resentencing and vacated one of the two DNA surcharges imposed. (77:6; A-Ap. 111.) Johnson now appeals.

ARGUMENT

I. The circuit court soundly exercised its discretion in denying Johnson's conclusory and speculative ineffective assistance claim without a hearing.

As explained in more detail below, Johnson's motion claimed that counsel should have investigated records of phone calls allegedly made between Johnson's phone and others during the time that K.M. alleged that Johnson was confining and assaulting her. (70:9; A-Ap. 122.) But Johnson offers nothing beyond guesses as to what the content of those calls were and what supposed witnesses to those calls would say about the calls. (70:12-14; A-Ap. 125-27.) The circuit court correctly concluded that his motion was conclusory and speculative, and properly exercised its discretion in denying it without a hearing.

A. A circuit court may deny a motion without a *Machner* hearing if the defendant fails to sufficiently allege supporting facts.

When a defendant alleges ineffective assistance of trial counsel, the defendant has the burden to show that counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A circuit court must conduct a hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Thus, "the motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *Bentley*, 201 Wis. 2d at 314) (brackets in *Allen*). A postconviction motion sufficient to meet this standard should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Allen*, 274 Wis. 2d 568, ¶ 23. If the motion raises such facts, and the record does not otherwise conclusively demonstrate that the defendant is not entitled to relief, the circuit court must hold an evidentiary hearing. *Id.*

If the defendant raises insufficient facts or conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may grant or deny a hearing in its discretion. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. The circuit court should "form its independent judgment after a review of the record and pleadings and . . . support its decision by written opinion." *Nelson*, 54 Wis. 2d at 498; *see Bentley*, 201 Wis. 2d at 318-19.

Whether the motion is sufficient to entitle a defendant to a hearing is a question of law that this Court reviews de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion is insufficient or the record conclusively shows that the defendant is not entitled to relief, this Court deferentially reviews the circuit court's discretionary decision whether to grant a hearing. *Allen*, 274 Wis. 2d 568, ¶ 9.

B. The circuit court properly concluded that Johnson's motion was "unsubstantiated, speculative and conclusory."

1. Johnson failed to allege sufficient, material facts to establish a reasonable probability of a different result based on the phone records.

In his motion, Johnson alleged that before trial, he prepared a list of phone calls that he remembered receiving between September 26 and September 28, 2012. (70:9-10; A-Ap. 122-23.) He also claims that he gave that list to his trial attorney to support his defense theory that K.M. sustained her injuries after leaving Johnson's apartment and that she returned to his apartment with E.M. intending to steal from him. (70:9; A-Ap. 122.) Thus, Johnson argued that counsel should have investigated and obtained Johnson's telephone records and presented them at trial, and was constitutionally ineffective for failing to do so.

Assuming that all of the calls occurred, Johnson merely provided conclusory allegations as to how any of the six calls could have supported his defense.

First, Johnson claimed that at 9:31 p.m. on September 27, Jesse McSwain, "friend and power of attorney of" Johnson, called Johnson; at 9:53 p.m., K.M.'s friend "John" called Johnson; and at 11:39 p.m., Johnson's ex-wife called Johnson. (70:9; A-Ap. 122.) Johnson claimed that the call from "John" would undermine K.M.'s credibility because she apparently denied John's existence at trial and would support Johnson's alternate defense theory that John picked up K.M. from Johnson's apartment before she sustained injuries and that John was involved in a plot to steal from Johnson. (70:13; A-Ap. 126.)

Johnson further claimed that the calls from McSwain and his ex-wife could undermine K.M.'s testimony of what happened on September 27. He wrote:

> Testimony from Mr. McSwain and/or Ms. Johnson who placed those calls to Mr. [Johnson] could have established (1) whether, and how long they spoke with Mr. [Johnson], (2) whether they were aware of the presence of [K.M.] on the premises, (3) whether they were aware that a struggle was going on during or in the background of the call, and (4) the demeanor of Mr. [Johnson].
>
> For example, testimony by Mr. McSwain or Ms. Johnson that they were unaware that anyone else was in [Johnson's] apartment as of 9:31 p.m. or 11:39 p.m. would have supported the defense theory that [K.M.] left [Johnson's] apartment much earlier than the 3:30-4:00 a.m. time frame she claimed at trial. . . .

(70:13-14; A-Ap. 126-27.)

Johnson offered mere speculation as to those calls. Evidence of a phone call proves only the existence of that phone call, and nothing more. As for "John's" call, it cannot be used to materially support Johnson's claim that John picked up K.M. at Johnson's apartment before she sustained her injuries. Johnson never identified who John was or how any content of that call could be introduced at trial. More importantly, Johnson does not show how John's phone call, despite the compelling evidence presented by the State at trial, creates a reasonable probability of a different result given K.M.'s detailed testimony that Johnson physically battered her; her extensive injuries; testimony that the police recovered her purse and jacket at Johnson's apartment; the corroborating testimony of Officer Waldenmeyer, Nolden, and E.M. as to K.M.'s injuries; and, most damningly, DNA evidence of K.M.'s blood found on Johnson's left palm.

Likewise, records that McSwain or Johnson's ex-wife called Johnson only show that Johnson received those phone calls. To successfully claim that counsel was ineffective for failing to investigate the ex-wife's or McSwain's knowledge about the calls, Johnson must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *State v. Leighton*, 2000 WI App 156, ¶ 38, 237 Wis. 2d 709, 616 N.W.2d 156. *see also State v.*

Arredondo, 2004 WI App 7, ¶ 40, 269 Wis. 2d 369, 674 N.W.2d 647 (requiring defendant to allege with specificity what an uncalled witness would have said if called to testify). In his motion, Johnson simply makes best-case-scenario guesses as to what either Johnson's ex-wife or McSwain could testify to regarding the phone calls, if anything. (70:13-14; A-Ap. 126-27.) Again, given the compelling evidence at trial that Johnson beat and confined K.M., that Johnson may have received phone calls on the night of September 27 does not create a reasonable probability of a different result. Johnson offered no material facts to suggest otherwise.[6]

Johnson also claimed that the telephone records would show that Johnson received phone calls from K.M. and E.M. at 4:21, 4:26, and 4:27 a.m. on September 28, which he asserted would undermine K.M.'s and E.M.'s testimony. (70:14; A-Ap. 127.) But Johnson did not explain how these phone calls

[6] In his reply brief to the postconviction court, Johnson provided an affidavit from his ex-wife stating that she had called Johnson at 11:25 p.m. on September 27, 2012. (76:Exh. A; A-Ap. 167-68.) She stated that she and Johnson had talked for about a minute about an air conditioner, and that during that time Johnson sounded calm and she could not hear "any noises or sounds of a struggle" on the other end of the phone. (*Id.*) For the same reasons as those stated above, the circuit court properly concluded that that evidence, even if true, "does not in any way establish or support a finding that the result of the proceedings would have been different." (77:4 n.2; A-Ap. 109.)

contradicted any of E.M.'s testimony; in fact, they squared up with his testimony that K.M. returned to their home at 3:30 a.m.

Further, Johnson's motion ignored that evidence of those calls would more likely bolster K.M.'s and E.M.'s testimony that they went to Johnson's apartment to confront him about his attack on K.M. than it would support a theory that they were trying to steal from him. Indeed, extensive evidence at trial contradicted his alternate defense theory. K.M. and E.M. did nothing consistent with would-be thieves bent on stealing from Johnson's apartment during the early-morning hours when they were outside his apartment. To the contrary, they caused a loud disturbance by yelling that Johnson had attacked K.M., ringing doorbells, and smashing Johnson's car window. In sum, even if Johnson somehow could bring in evidence that K.M. and E.M. called him at 4:21, 4:26, and 4:27 a.m., that evidence could not reasonably support his alternate defense theory that they meant to steal from him.

Finally, Johnson also alleged that evidence that K.M. called Johnson on September 26 would undermine K.M.'s testimony that she did not visit Johnson on that day. (70:14; A-Ap. 127.) The circuit court correctly concluded that even if K.M. made that call, it was not material to K.M.'s claims that Johnson assaulted and confined her on September 27 and 28 and would not have undermined K.M.'s credibility. K.M. testified that she

could not remember whether she went to Johnson's apartment on September 26. (105:59-60; A-Ap. 208-09.) Thus, proof that K.M. called Johnson on September 26 is not relevant to whether K.M. visited him that day, her lack of memory of doing so, or her claim that Johnson attacked and confined her on September 27 and 28.

In sum, Johnson's motion alleging ineffective assistance for failing to investigate the phone records lacked sufficient, material facts showing that he was entitled to relief.[7]

2. Johnson failed to allege sufficient, material facts to show that his counsel was ineffective for failing to call "John" as a witness or present his alternate defense.

In his motion, Johnson also argued that counsel was ineffective for failing to call witnesses and investigate "John" to support a defense theory that K.M. left Johnson's apartment before she sustained injuries and that she, E.M., and John were conspiring to steal from Johnson. (70:15; A-Ap. 128.) He wrote that "[e]vidence from 'John' would have been central to the

[7] Johnson also argued that his trial counsel's predecessor was ineffective for failing to investigate the phone records before the service provider destroyed the records. (Johnson's Br. 26-27.) For the same reasons that trial counsel was not ineffective—i.e., because evidence that Johnson received phone calls during and after the time that K.M. claimed that she was in his apartment proves nothing other than the existence of those calls, and Johnson offered nothing to establish what testimony as to the content of those calls that counsel would have discovered—he is not entitled to a hearing based on predecessor counsel's alleged failure.

defense case by not only establishing his identity, but providing clarity regarding what his relationship was to [K.M.] Furthermore, he could have testified as to why he placed a call to [Johnson] at 9:53 p.m. on the evening of September 27, 2012—right at the very time [K.M.] claimed the assault was taking place." (70:15-16; A-Ap. 128-29.)

When a defendant claims that trial counsel was deficient for failing to present testimony, he must allege with specificity what the witness would have said if called to testify. *Arredondo*, 269 Wis. 2d 369, ¶ 40. Given that Johnson did not identify who John is, let alone what John would have said in his testimony, Johnson has failed to satisfy this burden.

On appeal, Johnson argues that the circuit court should have granted a *Machner* hearing so that he could establish the significance of the phone calls and witness testimony. (Johnson's Br. 17-19.) But an "evidentiary hearing is not a fishing expedition." *State v. Balliette*, 2011 WI 79, ¶ 68, 336 Wis. 2d 358, 805 N.W.2d 334. Johnson may hope that "John" or other witnesses were available, that they would remember particular phone calls from September 2012, and that they would offer helpful testimony. But Johnson's obligation in his postconviction motion was to demonstrate that the missing witnesses would have given the testimony that he claims trial counsel should have secured. *See Arredondo*, 269 Wis. 2d 369,

¶ 40. Here, the circuit court correctly concluded that Johnson did not provide any material facts to compel an evidentiary hearing based on a failure to investigate John.

Johnson also argues that the circuit court erred because it failed to apply the *Allen* standard by assuming Johnson's allegations to be true. (Johnson's Br. 18-19.) Johnson misunderstands the *Allen* standard. While the court assumes that the factual allegations in a motion are true, it is not required to assume that Johnson's guesses and speculation are true or ignore that the record conclusively demonstrates that he is not entitled to relief. Here, the only factual allegations Johnson made in his brief were that he received a series of phone calls during the time K.M. claimed that Johnson was assaulting and falsely imprisoning her. The circuit court assumed that Johnson was telling the truth about those calls. But it was not required to assume, based on Johnson's speculation, that any of the witnesses he proposed were available or that they would have offered material testimony that had a reasonable possibility of changing the trial outcome.

Finally, as part of his complaint that counsel should have investigated "John," Johnson argued that counsel was ineffective for failing to present Johnson's alternative defense that K.M. sustained her injuries after leaving his apartment and that E.M. and K.M. (and "John") were trying to steal from him.

(Johnson's Br. 24-25.) As explained above, the record conclusively demonstrates that counsel was neither deficient nor prejudicial for failing to present that defense. The alternative defense would not have overcome the significant evidence that Johnson caused K.M.'s injuries or the utter dearth of evidence that K.M. and E.M. planned to steal from Johnson.

In sum, Johnson failed to offer sufficient, material facts in his motion. Rather, he relied on speculation and conjecture on what counsel would have discovered had he obtained the phone records and investigated the witnesses. The circuit court did not err in concluding that his pleading was insufficient under *Allen*, and hence, it did not erroneously exercise its discretion in denying Johnson's motion without a hearing.

II. Because the court's imposition of a single mandatory DNA surcharge is not an ex post facto violation, Johnson is not entitled to having it vacated.

In his postconviction motion, Johnson sought vacation of two DNA surcharges that the sentencing court imposed, arguing that the court violated ex post facto principles in imposing the surcharges because it described the charges to be "punishment." (70:17-19; A-Ap. 130-32.) The postconviction court vacated one of the surcharges, based on *State v. Scruggs*,

2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146,[8] in which this Court held that a court's imposition of a mandatory $250 DNA surcharge to a defendant who committed a felony when imposition of that surcharge was discretionary was not a punitive ex post facto violation. (77:6; A-Ap. 111.)

On appeal, Johnson argues that the postconviction court should have vacated both surcharges. (Johnson's Br. 28-29.) For the reasons below, the postconviction court granted Johnson all of the relief to which he is entitled.

Johnson committed his crimes against K.M. on September 27 and 28, 2012, at which point Johnson was subject to the court's discretionary imposition of a $250 DNA surcharge at sentencing. *See* Wis. Stat. § 973.046(1g) (2011–12). Beginning on January 1, 2014, all defendants convicted of a felony, including felonies committed before that effective date, were subject to a mandatory $250 DNA surcharge. *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am).

In *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, this Court held that the new statute was an unconstitutional ex post facto law as applied to Radaj because the statute required the court to impose a total DNA

[8] The Wisconsin Supreme Court granted review of *Scruggs*; according to the court web site, it currently is briefed and set for oral argument in October 2016.

assessment of $1000 (four times $250) based on Radaj's four felony convictions, resulting in a punitive effect. *Id.* ¶ 35.

This Court later addressed whether a single mandatory surcharge would constitute an ex post facto violation in *Scruggs*, 365 Wis. 2d 568. There, Scruggs committed her felony before January 1, 2014, and the court imposed a single mandatory $250 DNA surcharge at sentencing. This Court held that that imposition was not an ex post facto violation because a single surcharge is not punitive in its intent or effect, noting that the Legislature was "motivated by a desire to expand the State's DNA data bank and to offset the cost of that expansion, rather than punitive intent." *Id.* ¶ 10.

Here, the sentencing court imposed two DNA surcharges—one per conviction—on Johnson. (60:2; 113:39; A-Ap. 104, 298.) The sentencing court remarked, "He's required to provide a DNA sample and pay the DNA surcharge. The surcharge is mandatory, it's also in this case punishment, deterrence, and part of [Johnson's] rehabilitation." (113:39; A-Ap. 298.)[9]

Based on *Radaj* and *Scruggs*, the postconviction court vacated one of the two DNA surcharges. (77:5-6; A-Ap. 110-11.) That decision was correct. It is not an ex post facto violation for

[9] Although the court did not specifically state that it was imposing two surcharges, the judgment of conviction reflected a $500 DNA surcharge. (60:2; A-Ap. 104.)

a court to impose a single mandatory DNA surcharge on a defendant who committed his crimes when the surcharge was discretionary.

Johnson argues that *Scruggs* does not apply to his situation. He agrees that this Court in *Scruggs* held that the legislative intent behind making the surcharge mandatory was not punitive. Rather, he asserts that because the sentencing court here stated that it was imposing the DNA surcharges as "punishment," that statement transformed the otherwise non-punitive surcharge into a penalty. (Johnson's Br. 30-32.)

Johnson is wrong. Whether the sentencing court believed the imposition of the surcharge was punishment does not render the legislative intent and effect of the statute punitive. Because the surcharge is mandatory, a sentencing court simply must impose it; the court need not explain its rationale. Thus, here, the court's remarks that it believed that the surcharge would punish, deter, and rehabilitate Johnson were irrelevant. The count had to impose a single mandatory surcharge regardless of its belief as to its effects.

In sum, Johnson's situation is on all fours with *Scruggs*. The court's imposition of a single mandatory DNA surcharge on Johnson is not an ex post facto violation. He is not entitled to any relief beyond what the postconviction court has already provided.

III. Johnson failed to establish that the court relied on inaccurate information at sentencing.

When reviewing a sentencing court's decision, this Court begins with the presumption that the sentencing court acted reasonably and will not interfere with its decision unless the court erroneously exercised its discretion. *State v. Lechner*, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998).

A defendant has a due process right to be sentenced based on materially accurate information. *Id.* at 419. Whether the court has denied a defendant of that right is a question of law that this court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

A defendant seeking resentencing on the grounds that the circuit court used inaccurate information at sentencing must show, first, that the information was inaccurate, and second, that the court actually relied on that inaccurate information in forming its sentence. *Id.* ¶ 26 (citing *Lechner*, 217 Wis. 2d at 419). If the defendant satisfies those requirements, the burden shifts to the State to prove that the error was harmless. *Id.*

Johnson failed to demonstrate that there was inaccurate information, let alone that the court relied on it. In his motion, Johnson argued that he was entitled to an evidentiary hearing and resentencing because the PSI had six specific errors or omissions. The whole of his argument there follows:

> In this case, trial counsel raised on the record six specific errors and omissions on pages 6-10 of the PSI, and noted Mr. Shabazz's general objection to the PSI in its entirety. Most of those errors related to various Milwaukee Police Department (MPD) reports, which ended either in a dismissal or a decision not to prosecute. Even if Mr. Shabazz were not entitled to a new trial (which he is for the reasons set forth above), he is at very least "entitled to an evidentiary hearing where evidence regarding the issue in controversy may be presented by the State or the defendant."

(70:19-20; A-Ap. 132-33 (record and case citations omitted).)

But at the onset of the sentencing hearing, the court allowed counsel to correct any errors in the report. (113:4-6; A-Ap. 291-93.) Defense counsel described these errors as "errors of omission," which related to details of cases listed in Johnson's criminal history. (*Id.*) Those alleged errors involved a discussion of Johnson's transfer between institutions, clarifications that a few misdemeanor cases were dismissed, clarifications that a few cases mentioned were no-process cases, and identification of one case that counsel could not verify on CCAP. (*Id.*) The circuit court accepted those changes and proceeded with sentencing. (*Id.* at 6; A-Ap. 293.)

Johnson cannot satisfy *Tiepelman* for several reasons. First, if there was inaccurate information in the PSI, counsel here safeguarded Johnson's right to be sentenced on the basis of accurate information by providing corrections to the PSI to the court. *See State v. Mosley*, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996). In other words, the court had accurate information because counsel provided it.

Second, if Johnson is arguing that despite counsel's corrections, the court actually relied on the PSI's original inaccurate information, he again fails. Here, the court made an extensive sentencing statement, which included explicit attention to each of the *Gallion* sentencing factors and why the maximum penalty was appropriate. (113:29-39.)

The court explained that punishment, deterrence, and protection of the public were the most important factors in this case. (113:29; A-Ap. 294.) It observed that Johnson had a long history of reoffending and being revoked from parole or probation, and that Johnson did everything he could to delay the prosecution in this case and paint himself as the victim. (113:29-30, 31-32.) It highlighted the serious gravity of the offenses and the devastating effect they had on K.M. (113:30, 32.) The court emphasized Johnson's 20-plus-year criminal career and high risk of reoffending, observing that Johnson had "25 priors, there were many, many additional cases that were dismissed, no processed, other dispositions." (113:34.)

Contrary to Johnson's argument on appeal (Johnson's Br. 34), at no point did the court expressly rely on the handful of dismissed, no-process, or other cases counsel brought up at the start of the sentencing hearing. Putting those corrections aside, the court had plenty of material—over 20 years' worth of convictions and violations, along with Johnson's violent acts in

committing this crime and sandbagging the trial proceedings—upon which to justify its sentences of six years on each count.

Johnson further complains that he was not afforded an adequate opportunity to clarify the errors in the PSI, and that the court should have granted him a hearing. (Johnson's Br. 35.) Again, Johnson misses the forest for the trees. The corrections that counsel offered downgraded a handful of over two dozen prior convictions over Johnson's significant and prolific criminal career. Further, Johnson identifies nothing about counsel's explanations or of the alleged errors themselves that required an additional hearing.

In sum, Johnson did not come close to establishing that he was entitled to resentencing. The postconviction court did not err in denying his motion without a hearing.

IV. Johnson is not entitled to a new trial in the interest of justice.

Under Wis. Stat. § 752.35, this court may order discretionary reversal for a new trial: (1) where the real controversy has not been tried; or (2) where there has been a miscarriage of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Appellate courts approach "a request for a new trial with great caution," and will exercise their discretionary power "only in exceptional cases." *State v. Armstrong*, 2005 WI 119, ¶ 114, 283

Wis. 2d 639, 700 N.W.2d 98 (internal quotation marks and quoted source omitted).

Johnson argues that he is entitled to a new trial in the interest of justice because the real controversy, i.e., that Johnson was not the person who caused K.M.'s injuries based on the phone call records, was not tried. (Johnson's Br. 36-37.) He claims that if counsel had presented his alternate defense, a different result would have been probable, in light of the jury's acquittal on two of the charges, inconsistencies in K.M.'s testimony, and the lack of physical evidence. (Johnson's Br. 37-38.)

For the same reasons that counsel was not ineffective for failing to investigate the phone records and otherwise somehow present Johnson's alternate defense, the real controversy was tried and justice did not miscarry. Even if the State failed to prove the sexual assault and strangulation charges, the evidence was insurmountable that Johnson—not some third party as part of a plot to steal from Johnson—assaulted and falsely imprisoned K.M. This is far from the "exceptional" case demanding that this Court reverse in the interest of justice.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this Court affirm the judgment of conviction and decision and order denying Johnson's motion for postconviction relief.

Dated this 23rd day of June 2016.

Respectfully submitted,

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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 5812 words.

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Sarah L. Burgundy
Assistant Attorney General

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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 23rd day of June, 2016.

_____

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