STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2018AP1593-CR & 2018AP1594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO L. BELL,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDERS DENYING MOTIONS FOR POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWOSKI, THE HONORABLE DANIEL L. KONKOL, AND THE HONORABLE CAROLINA STARK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes

ISSUES PRESENTED

Defendant-Appellant Antonio L. Bell tried to withdraw his no-contest pleas to sexual assault charges on two grounds. First, he claimed that his counsel had been ineffective for not investigating whether the boyfriend of one of his victims might have committed the assaults. Second, he maintained that the other victim's recantation was newly discovered evidence. The circuit court denied the claims without hearings.

1. Was Bell entitled to a hearing on his ineffective assistance of counsel claim?

The circuit court answered no.

This Court should answer no.

2. Was Bell entitled to a hearing on his newly discovered evidence claim?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

Bell pleaded no contest to sexually assaulting his daughter CB and his stepdaughter SE. Both victims tested positive for chlamydia, though Bell did not.

After his conviction, Bell sought to withdraw his pleas on two grounds. He first claimed that his lawyers had been ineffective for not investigating whether SE's boyfriend, AC, who had also tested positive for chlamydia, had committed the

assaults. Second, Bell argued that CB had recanted and said that AC had assaulted her and told her to blame Bell. The circuit court denied both claims without a hearing.

This Court should affirm. Bell knew about the evidence supporting his claim that AC could have committed the assaults before he entered his pleas. And such evidence would not have been admissible at a trial. Thus, Bell cannot prove that his attorneys were ineffective for not investigating AC.

In addition, Bell's newly discovered evidence claim fails. CB's recantation is unexplained, fails to satisfy the test for newly discovered evidence, and lacks corroboration. The circuit court properly denied Bell a hearing on this claim.

STATEMENT OF THE CASE

Pre-plea proceedings and Bell's pleas and sentencing

The State charged Bell with first-degree sexual assault of a child for having penis-to-anus contact with CB, his nine-year-old daughter. (R. 1:1.)[1] She tested positive for rectal chlamydia. (R. 1:1.)

SE, Bell's 15-year-old stepdaughter,[2] then disclosed that Bell had touched her vagina over her clothes when she was seven years old, and that he had penis-to-vagina contact with her when she was 15. (R. 2018AP1594-CR, 1:1–2.) SE also tested positive for chlamydia. (R. 2018AP1594-CR, 1:2.) Based on SE's accusations, the State charged Bell with one count of first-degree sexual assault of a child and one count of second-degree sexual assault of a child. (R. 2018AP1594-CR, 1.)

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[1] All record citations are to the record in 2018AP1593-CR unless otherwise noted.

[2] Although Bell and SE were not legally stepfather and stepdaughter, they effectively had that relationship. (R. 100:6.)

The State moved to join the charges in the two cases. (R. 5; 103:9.)

Bell's counsel opposed the joinder. (R. 6.) He noted that "each one of these alleged victims has tested positive for Chlamydia, and it appears that the boyfriend of one of the victims has tested positive for Chlamydia." (R. 100:8.) Counsel said that he was worried about the prejudicial effect of this evidence. (R. 100:8–9.)

The prosecutor responded that "the older victim's boyfriend had Chlamydia," and that the police had not been able to find him. (R. 100:10, 13.) She also asked the court not to consider this information in resolving the joinder issue without first deciding whether the chlamydia-related evidence was admissible. (R. 100:10.)

The defense asked for a week to file a motion addressing the admissibility of the evidence. (R. 100:14.) The court delayed its decision on joinder. (R. 100:15.)

At a later hearing, the parties told the Court that CB might recant her accusation. (R. 102:3–4.) The prosecutor said that she planned to have a police officer interview CB. (R. 102:7.) She also explained that after she had heard that CB would recant, she discovered calls that Bell had made to CB from the jail. (R. 102:7.) The prosecutor said that she thought the calls were related to the possible recantation. (R. 102:3–4, 7.)

The parties also discussed the joinder motion and the chlamydia evidence. (R. 102:8.) Defense counsel explained that he understood that, as a result of the allegations, child welfare authorities had interviewed Bell's three daughters. (R. 102:8.) He said that he also understood that "the allegation was not that Mr. Bell had been the individual having sex with these girls, but that the individual having sex, at least one of the individuals having sex, with these girls was the boyfriend of the older girl." (R. 102:8.) Counsel said

that the boyfriend's name was PM, he was 16 years old, and he had tested positive for chlamydia. (R. 102:9.) He further asserted that it was possible that PM was the source of the victims' disease, and the girls were accusing Bell because they did not want PM to get in trouble. (R. 102:9–10.) Counsel also said that Bell did not have chlamydia. (R. 102:10.)

For her part, the prosecutor said that she was looking for PM, who she thought was SE's boyfriend. (R. 102:10.) She also said the State's theory at trial would be that Bell gave SE chlamydia, which she then gave to her boyfriend. (R. 102:10.) And, the prosecutor noted, Bell could have easily received treatment for chlamydia under a false name, preventing an accurate report to health officials. (R. 102:11.)

The court adjourned a decision on the State's joinder motion to allow the defense to further explore the evidence involving SE's boyfriend. (R. 102:11–15.)

The prosecutor's and defense counsel's assertions at the hearing were not completely accurate. A police report from August 2011, before the hearing in May 2012, indicated that PM had tested negative for any sexually transmitted diseases. (R. 79:15.) PM was the boyfriend of TB, another daughter of Bell's. (R. 79:15; 110:17–18.) According to the same report, SE's boyfriend, identified by a nickname, had tested positive for chlamydia. (R. 79:15.) Another report, describing the boyfriend by a shortened version of the nickname, said that his initials were AC. (R. 42:15.)

Additionally, during one of Bell's phone calls from the jail with CB, she told him that "me [PM] and [TB] was humping." (R. 9:2.) She told Bell "Yes" when he asked if PM was "the only one [who] did it." (R. 9:2.) CB also said that SE

and AC were "up there humping." (R. 9:2.) She denied that AC did anything to her. (R. 9:2.)[3]

Police interviewed CB about her recantation. (R. 79:13; 102:3–4.) CB said it was a "lie" that her dad had "humped her body." (R. 79:13.) She also acknowledged that she had spoken to Bell on the phone. (R. 79:13.) When police asked CB if Bell had told her during the call to say anything, she said that "[h]e told her to say it was [PM]." (R. 79:13.) CB also told the officer "that there was one time that [PM] did do something to her," though she had previously denied this. (R. 79:13.) And when police asked if Bell had done something to her, she repeated that he had told her to say it was [PM]. (R. 79:13.) CB also said that Tammy, who was her aunt and Bell's sister, told her to say that Bell had assaulted her (R. 79:13.)

The court joined the cases at the next hearing. (R. 103:4–9.) After that, defense counsel indicated that he wanted child welfare records that he believed would show that "the boyfriend had conducted the sexual activity." (R. 103:10.) Counsel now identified the boyfriend as SE's boyfriend. (R. 103:11.) The court noted that counsel had not filed a motion seeking to admit evidence that a third party had committed the crimes. (R. 103:10–11.) At the subsequent hearing, Bell's counsel withdrew without having filed the motion. (R. 104:3–6.)

When new counsel appeared at a later hearing, he said that he was still investigating "the possibility of a third party defense motion." (R. 106:3–4.) He added, though, that he did not have a factual basis to file one. (R. 106:3–4.)

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[3] In the call, CB referred to AC by the nickname used in the police report. She also used a nickname for SE. There does not appear to be any dispute that CB was referring to SE and AC. The State omits the nicknames to prevent potential identification of SE and AC and to avoid confusion.

The parties reached a plea agreement. The charge involving CB would be amended to one count of second-degree sexual assault of a child. (R. 109:3–4.) The charges involving SE would be amended to one count of third-degree sexual assault. (R. 109:4.) Bell would plead no contest, and the State would make a global sentencing recommendation. (R. 109:4, 7–8.) The agreement allowed Bell to avoid a 25-year mandatory minimum sentence. (R. 109:10.) It also reduced his sentence exposure from 160 years to 50 years. (R. 1; 109:10, 21; 2018AP1594-CR, 1.) Bell's counsel told the court that Bell did not want the victims to have to go through a trial. (R. 109:9.)

The prosecutor explained why she was making the agreement. (R. 109:10–11.) She said that CB had "disclosed that there was sexual contact with somebody else, and then it was her father. And after the jail calls, she recanted that." (R. 109:10.) The prosecutor said that she did not know what CB would testify to at the planned trial. (R. 109:10.) She acknowledged that there were difficulties arising from CB's recantation. (R. 109:10–11.) The prosecutor also explained that, if she went to trial, she ran the risk that she would not be able to prove that Bell had chlamydia. (R. 109:11.)

The circuit court accepted the parties' agreement and Bell's no-contest pleas. (R. 109:9–30.)

Bell maintained his innocence to the author of the presentence investigation. (R. 17:12.) He told the author that he "suspects it was SE's boyfriend who committed the sexual assaults against the girls." (R. 17:12.) Bell also said that the boyfriend had tested positive for chlamydia. (R. 17:12.)

At the sentencing hearing, the court noted Bell's comments to the PSI author and asked him if he wanted to withdraw his plea. (R. 110:5.) Bell said that he did not. (R. 110:5–6.)

In her sentencing argument, the prosecutor said that she did not have medical evidence that Bell had chlamydia. (R. 110:17.) But, she said, Bell had previously reported to his mother that it burned when he urinated. (R. 110:16–17.) And according to a police report, Bell had told his mother that he had chlamydia. (R. 44:19.)

Additionally, the prosecutor explained that CB had initially "made some disclosures about some juvenile offenders." (R. 110:13.) But, she said, CB's rectal chlamydia "didn't match anything" regarding what she had disclosed about the juvenile offenders, whereas CB had accused Bell of having had penis-to-anus contact with her. (R. 110:13, 16.)

In his sentencing argument, defense counsel noted that, had the case gone to trial, "[t]he source of Chlamydia would have been contested" because Bell had tested negative for the disease. (R. 110:21.) Counsel also said that SE had "a relationship with a boy that the discovery suggests may have also had chlamydia, so the source there would be in dispute." (R. 110:21.) Finally, counsel noted that CB had initially accused someone else of assaulting her, then said Bell did it, and then recanted that accusation. (R. 110:21.)

The circuit court gave Bell consecutive sentences totaling 12 years of initial confinement and eight years of extended supervision. (R. 110:42–43.)

Postconviction proceedings

Bell filed two postconviction motions. In the first, he claimed that his attorneys were ineffective for not investigating AC as having committed the assaults against SE and CB. (R. 42.) Bell claimed that counsel should have, after the investigation, filed a motion under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), to introduce evidence that AC was responsible for the crimes. (R. 42:4–8.) He also claimed that the rape-shield law would not have barred the evidence. (R. 42:9–11.)

The circuit court denied the motion without a hearing. (R. 48.) It concluded that counsel was not deficient because a *Denny* motion would have failed. (R. 48:5–6.) Specifically, it concluded that AC's having chlamydia did not establish a defense to the assaults, and there was also no evidence that AC had motive or the opportunity to assault CB. (R. 48:5–6.) Because Bell's *Denny* argument failed, the court did not address his rape-shield argument. (R. 48:6.) The court also determined that Bell would have still pleaded no contest because he knew before his pleas that there was a potential third-party defense. (R. 48:6–7.)

Bell claimed in the second motion that a recantation by CB was newly discovered evidence. (R. 79:4–10.) Specifically, he maintained that CB had recanted to Tammy. (R. 79:3.) Bell maintained that CB told Tammy that AC, not Bell, had assaulted her and that AC had told her to blame Bell. (R. 79:3.)

The circuit court denied this motion without a hearing as well. (R. 92.) It concluded that this evidence was not new. (R. 92:4.) Bell had been aware when he entered his pleas that CB had recanted. (R. 92:4.) The new recantation, the court said, was just "additional information about who did it." (R. 92:4.) Additionally, the court noted that Bell had suspected before he pleaded no contest that AC had assaulted CB, yet he not only decided to enter his pleas, but said at sentencing that he did not want to withdraw them. (R. 92:4.)

Bell appeals. (R. 93.)

ARGUMENT

I. The circuit court properly denied Bell's ineffective assistance of counsel claim without a hearing.

A. A circuit court can deny a postconviction motion alleging ineffective assistance of counsel without an evidentiary hearing if the record demonstrates that the defendant is not entitled to relief or if the motion is inadequately pleaded.

To withdraw his plea after sentencing, a defendant has to prove a manifest injustice. *State v. Taylor*, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482. Ineffective assistance of counsel can constitute a manifest injustice. *Id.* ¶ 49.

A defendant cannot succeed on a claim that counsel was ineffective unless the circuit court first holds an evidentiary hearing to preserve counsel's testimony. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

A defendant is not automatically entitled to an evidentiary hearing. To obtain one, the defendant must allege facts in a postconviction motion 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 *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)).

If the petitioner does not raise sufficient facts, if the allegations are merely conclusory, or if the record conclusively shows that the petitioner is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. *Bentley*, 201 Wis. 2d at 309–10.

To show that counsel was ineffective, a defendant must establish both that trial counsel's performance was deficient and that this performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

To establish prejudice when a defendant alleges that counsel's deficiencies led him to plead guilty or no contest, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty [or no contest] and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "A defendant must do more than merely allege that he would have [pleaded] differently." *Bentley*, 201 Wis. 2d at 313.

B. Bell's motion insufficiently alleged deficient performance, and the record demonstrated that his attorneys were not deficient.

This Court should conclude that Bell was not entitled to a hearing on his allegations of deficient performance for two reasons. First, his motion failed to allege what evidence his attorneys should have found about AC that Bell did not already know when he entered his pleas. Second, the evidence that AC had chlamydia and had sex with SE would have been inadmissible, and thus, the record demonstrates that Bell's lawyers were not deficient for failing to try to admit it.

1. Bell's motion failed to allege what new information counsel could have uncovered by further investigating AC.

In his postconviction motion, Bell asserted that he expected AC to testify that he was dating SE, that they had engaged in sexual intercourse, and that he had tested positive for chlamydia. (R. 42:5.) Bell further alleged that police reports confirmed this information. (R. 42:5.) And, Bell

argued, his attorneys had been ineffective for not further investigating AC. (R. 42:5–6.)

This inadequately alleged deficient performance. Bell claimed that his attorneys were deficient for failing to uncover information that he already knew at the time he pleaded no contest. That is not enough to prove ineffective assistance.

When a defendant claims that his counsel failed to investigate, he "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 126. This Court should not be "left to wonder" whether the correction of counsel's alleged failures would have contributed credible and reliable information to meet the defendant's burden of proof. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999). And when a postconviction motion does not allege sufficient facts to allow the circuit court to meaningfully assess the defendant's claim, the court can deny the motion without a hearing. *Bentley*, 201 Wis. 2d at 309–10.

The allegations of deficient performance in Bell's motion fell short of these pleading standards. The allegations asserted two pieces of information: that AC was having sex with SE, and that AC tested positive for chlamydia. This was established and undisputed information known to Bell before he decided to plead no contest.

Police reports indicated that SE and AC were having sex and that he had tested positive for chlamydia. (R. 42:15; 79:15.) At a pre-plea hearing, Bell's counsel said that one of the victim's boyfriends had tested positive. (R 100:8.) The State confirmed that it was the boyfriend of the older victim, SE. (R. 100:10, 13.) At a later hearing, defense counsel confirmed that he knew it was SE's boyfriend who had chlamydia. (R. 103:10–11.) And, at the same hearing, counsel

suggested that Bell's defense might be to argue that AC, not Bell, assaulted the victims. (R. 103:10–11.)

Thus, before Bell pleaded no contest, he knew that AC and SE were sexually active and that AC had tested positive for chlamydia. This is all the information that Bell later claimed in his motion that his attorneys were ineffective for not uncovering. Bell's motion did not identify with any specificity what more counsel should have discovered. And without that information, he cannot now show that the outcome of his case would have been any different. This Court should conclude that Bell failed to adequately allege his claim that his attorneys were ineffective.

2. Bell has not shown that this evidence would have been admissible at trial.

This Court should also conclude that Bell's deficient-performance argument fails because he cannot prove that the evidence would have been admissible. Counsel does not act deficiently for failing to try to introduce inadmissible evidence. *See State v. Wirts*, 176 Wis. 2d 174, 181, 500 N.W.2d 317 (Ct. App. 1993).

Bell contends that the evidence would have been admissible to show that AC assaulted both SE and CB as third-party-perpetrator evidence under *Denny*. (Bell's Br. 14–16.) He also argues that, while the evidence would have been barred under the rape-shield statute, it would nonetheless have been admissible under the exception to the statute established by *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). (Bell's Br. 16–23.) Both of his arguments are wrong.

a. Third-party-perpetrator evidence

Bell argues that, under *Denny*, he could have presented the evidence that AC and SE were having sex and that AC tested positive for chlamydia to establish that AC, not Bell, assaulted both victims. (Bell's Br. 14–16.) Bell's *Denny* argument fails because he has not established that this evidence created a legitimate tendency that AC committed the crimes.

A defendant seeking to admit evidence that a known third party could have committed the crime must satisfy all three prongs of the *Denny* "legitimate tendency" test. *State v. Wilson*, 2015 WI 48, ¶¶ 52, 64, 362 Wis. 2d 193, 864 N.W.2d 52. Those prongs involve the following inquiries: *First*, the motive prong asks, "[D]id the alleged third-party perpetrator have a plausible reason to commit the crime?" *Id.* ¶ 57. *Second*, the opportunity prong asks, "[D]oes the evidence create a practical possibility that the third party committed the crime?" *Id.* ¶ 58. *Third*, the direct-connection prong asks, "[I]s there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly?" *Id.* ¶ 59.

Bell's argument fails at each step. He contends that the evidence established that AC was motivated by his desire for sexual gratification to have sex with SE. (Bell's Br. 15.) But he does not explain how that gave AC the motive to have sex with SE in the circumstances alleged in the complaint. The State charged Bell with having penis-to-vagina intercourse with SE on a couch in their house when she was 15 years old. (R. 2018AP1594-CR, 1:1–2.) It also charged Bell with touching SE's vagina over her clothes when she was seven years old. (R. 2018AP1594-CR, 1:1–2.) Bell does not say how the evidence explains SE's motive to do either of these things.

Moreover, in his appellate brief, Bell does not even discuss a possible motive for AC to assault CB. (Bell's Br. 15.) This Court need not address whether Bell has shown one. *State v. Petitt*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992). In his postconviction motion, Bell asserted that AC's motive to assault CB would also have been his desire for sexual gratification. (R. 42:6.) But there is no reason to assume that AC would be motivated to assault CB just because he was having sex with her older sister. This Court should reject Bell's speculative argument.

Next, Bell argues that AC's and SE's having sex necessarily gave AC the opportunity to commit the crimes. (Bell's Br. 15.) But Bell has to prove that AC had the opportunity to commit the specific acts involving SE that are alleged in the complaint, which he does not do. It is not enough for Bell to show that AC had a general opportunity to have sex with SE.

And, again, Bell does not explain how AC had the opportunity to assault CB. (Bell's Br. 15.) In his motion, he argued that CB's telling Bell during the phone call that SE and AC were having sex shows opportunity because it proves that they were together in the same area. (R. 42:7.) But this ignores that CB denied during the phone call that AC had done anything to her. (R. 9:2.) The call thus provides no basis for this Court to conclude that AC had the opportunity to assault CB.

Bell's *Denny* claim also fails on the direct-connection prong. He again points to the undisputed facts that SE and AC were having sex, and that AC had chlamydia. (Bell's Br. 16.) But he nowhere explains how this connects AC to the specific allegations in the complaints about the assaults of SE and CB. Bell has offered no evidence that AC could have committed the crimes against either victim. He has thus not shown that his attorneys were deficient for failing to file a motion to admit *Denny* evidence.

b. Constitutional exception to the rape-shield law.

Bell acknowledges that this evidence would have been inadmissible under the rape-shield law, Wis. Stat. § 972.11(2)(b), because it involves SE's past sexual conduct. (Bell's Br. 17.) He argues, though, that evidence would have been admissible under the *Pulizzano* exception to the rape-shield law. (Bell's Br. 16–21.) Bell claims that attorneys acted deficiently for not seeking to introduce the evidence on this basis. (Bell's Br. 16–21.)

The rape-shield law prohibits, with exceptions not applicable here, the introduction of evidence of a sexual assault victim's past sexual conduct. Wis. Stat. § 972.11(2)(b); *State v. Dunlap*, 2002 WI 19, ¶ 17, 250 Wis. 2d 466, 640 N.W.2d 112. Under certain circumstances, though, a defendant is allowed to present evidence barred by the statute when it is needed to protect the defendant's constitutional right to present a defense. *Pulizzano*, 155 Wis. 2d at 645–48.

To show that the evidence is admissible under *Pulizzano*, the defendant must satisfy a two-part inquiry. First, the defendant must establish: "(1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect." *Pulizzano*, 155 Wis. 2d at 656.

If the defendant makes a sufficient showing under the first *Pulizzano* prong, the court then determines whether the State's interests in excluding the evidence are so compelling that they trump the defendant's right to present it. *Pulizzano*, 155 Wis. 2d at 656–57. The Wisconsin Supreme Court has characterized the *Pulizzano* test as a "narrow test to determine when a defendant's right to present a defense

should supersede the [S]tate's interest in protecting the complainant from prejudice and irrelevant inquiries." *Dunlap*, 250 Wis. 2d 466, ¶ 20.

This Court should reject Bell's argument that the evidence was admissible under the *Pulizzano* exception.

Initially, Bell's argument fails because it is premised on a new interpretation of *Pulizzano* that counsel could not have been deficient for making. Counsel is not deficient for failing to make novel legal arguments or to argue unsettled points of law. *See State v. Lemberger*, 2017 WI 39, ¶ 33, 374 Wis. 2d 617, 893 N.W.2d 232; *State v. McMahon*, 186 Wis. 2d 68, 84–85, 519 N.W.2d 621 (Ct. App. 1994).

Bell wants to introduce evidence of SE's sexual conduct to show that someone else committed the crimes against her and her sister. The *Pulizzano* exception, though, allows defendants to introduce otherwise inadmissible evidence in child sexual assault cases to show an alternate basis for the child's knowledge of sexual matters. *See, e.g., State v. Carter*, 2010 WI 40, ¶ 41, 324 Wis. 2d 640, 782 N.W.2d 695. Bell points to no published decision of this Court or the supreme court holding that defendants can use the exception in the way that he wants to use it. He points to *State v. Herdon*, 145 Wis. 2d 91, 98, 426 N.W.2d 347 (Ct. App. 1988), but that case involved evidence of victim's arrests for prostitution, not evidence that someone else might have committed the crimes. (Bell's Br. 18 n.7.) Because there is no case applying the *Pulizzano* exception in the way that Bell proposes, his counsel was not deficient for failing to argue it should apply to the evidence here.

Further, Bell's claim fails the *Pulizzano* test. Before addressing the test's prongs, the State notes that Bell limits his arguments to comparing the evidence to the facts of his more recent assault of SE. He does not address his assault of

her when she was seven years old or his assault of CB. The State similarly limits its discussion.

The State concedes that Bell can show that the prior act clearly occurred. (Bell's Br. 19.) There is no question that SE and AC had sex. And the acts closely resemble each other in the sense that they both involve penis-to-vagina intercourse, though there is no suggestion that SE's and AC's sex involved the violence of Bell's assault. (R. 2018AP1594-CR, 1:1–2.) (Bell's Br. 19.)

The evidence is not highly relevant. Bell claims that he needed to use the evidence to refute any suggestion by the State that he gave SE chlamydia. (Bell's Br. 19.) But whether Bell or someone else gave SE this disease was not critical to the charges. The State did not, for example, charge Bell with sexually assaulting someone and giving them a disease. *See* Wis. Stat. § 940.225(2)(b). Moreover, this evidence was not necessary for Bell to argue that he did not give SE chlamydia. Bell did not have the disease, and the State had no medical evidence that he ever had. (R. 102:10–11; 109:11; 110:17.) He could rely on all this to refute any suggestion that he had infected SE.

Likewise, the evidence was not necessary to Bell's defense. If the State was allowed to argue that Bell gave SE chlamydia, Bell could challenge this argument by pointing out that he did not have the disease. He also could, of course, deny assaulting SE.

In addition, the prejudicial effect of the evidence vastly outweighed its probative value. Introducing evidence of SE's past sexual activity would violate the purpose of the rape-shield law, which makes evidence of a victim's past sexual conduct irrelevant and prejudicial to the truthfulness of the current allegations. *See Carter*, 324 Wis. 2d 640, ¶ 39; *Dunlap*, 250 Wis. 2d 466, ¶ 19. Moreover, as the circuit court recognized, "[W]ho had Chlamydia, and who did not, and who

gave it to whom, was not determinative as to who sexually assaulted the victims." (R. 48:5.) There was no reason to let the jury risk making the inference prohibited by the rape-shield law just so Bell could introduce evidence on a tangential issue.

Finally, and for similar reasons, the State's interest in excluding this evidence outweighs Bell's interest in presenting it. Again, the evidence relates to a non-determinative issue. Bell could still defend against any accusation that he gave the victims chlamydia without the evidence. And the risk of the jury's drawing the prohibited inference from SE's sexual past is too high to justify its admission. Bell's attorneys were not deficient for failing to seek to admit the evidence under the *Pulizzano* exception.

C. Bell's motion failed to adequately allege prejudice.

This Court should also conclude that the circuit court properly denied Bell a hearing on his ineffective assistance claim because his motion did not sufficiently assert that he was prejudiced. While the circuit court did not rely on this reasoning in its postconviction decision, this Court can affirm that decision based on other grounds. (R. 48:6–7.) *State v. Smiter*, 2011 WI App 15, ¶ 9, 331 Wis. 2d 431, 793 N.W.2d 920.

Bell needed to assert non-conclusory allegations in his motion explaining why, had his attorneys done more investigating, he would have gone to trial instead of pleading no contest. Bell's motion came nowhere close to meeting this standard. His entire prejudice allegation is, "Mr. Bell was prejudiced by that deficiency because he would have gone to trial had the evidence been gathered." (R. 42:10–11.) That is a conclusory statement. It does not provide any explanation why, specifically, Bell would have chosen a trial over the plea agreement with the State had his attorney conducted some

unidentified investigation into AC. "A defendant must do more than merely allege that he would have [pleaded] differently." *Bentley*, 201 Wis. 2d at 313. But that is all that Bell did in his motion.

The lack of any developed argument here is particularly troublesome given that the record is full of reasons suggesting that Bell would have taken the plea agreement regardless of his attorneys' investigation. Most noteworthy is Bell's statement, to the court through counsel and to the PSI author in person, that he pleaded no contest to spare the victims' having to go through a trial. (R. 17:12; 109:9.) Bell also reduced his sentence exposure by 110 years and avoided a mandatory-minimum sentence by taking the agreement. (R. 1; 109:10, 21; 2018AP1594-CR, 1.) Further, Bell disclaimed any desire to withdraw his pleas before sentencing despite protesting his innocence to the PSI author. (R. 110:5–6.) Finally, as noted, Bell already knew before his pleas that AC and SE has engaged in sex and that AC had chlamydia, and he pointed to nothing else that his attorneys could have uncovered with a further investigation. The record thus shows that Bell would have pleaded guilty no matter what his attorneys uncovered.

Bell claims that the closeness of his plea to the trial date, his maintaining of his innocence, and the strength of his defense are reasons why he would have gone to trial. (Bell's Br. 22–23.) But Bell knew all those things before entering his pleas. And he also knew before his pleas about SE and AC having sex and AC's testing positive for chlamydia. Bell was not entitled to a hearing on his claim that his attorneys were ineffective.

II. The circuit court properly denied Bell an evidentiary hearing on his newly discovered evidence claim.

A. To get a hearing on this claim, Bell needed to plead sufficient facts showing that CB's recantation was new and corroborated evidence.

When a claim of manifest injustice to withdraw a guilty or no contest plea is based on newly discovered evidence, "the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in [discovering] evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997); *State v. Ferguson*, 2014 WI App 48, ¶ 24, 354 Wis. 2d 253, 847 N.W.2d 900.

If the defendant proves those criteria, the circuit court must determine "whether a 'reasonable probability exists that a different result would be reached in a trial.'" *Ferguson*, 354 Wis. 2d 253, ¶ 24 (quoting *McCallum*, 208 Wis. 2d at 473). This inquiry asks whether there is a reasonable probability that a jury, looking at both the old and new evidence, would have a reasonable doubt as to the defendant's guilt. *McCallum*, 208 Wis. 2d at 475.

Additionally, if the new evidence is a recantation, it "must be corroborated by other newly discovered evidence." *Ferguson*, 354 Wis. 2d 253, ¶ 25 (quoting *McCallum*, 208 Wis. 2d at 473–74). The corroboration requirement is necessary because recantations are "inherently unreliable." *McCallum*, 208 Wis. 2d at 476. A defendant satisfies the corroboration requirement if by demonstrating that (1) "there is a feasible motive for the initial false statement," and

(2) there are "circumstantial guarantees" of the recantation's trustworthiness. *Id.* at 476–78.

B. Bell was not entitled to a hearing because his motion was insufficient and CB's recantation fails the test for newly discovered evidence.

The circuit court properly denied Bell a hearing on his claim that CB's recantation was newly discovered evidence. Bell's allegations are unsubstantiated and fail to establish that the recantation qualifies as newly discovered evidence.

Bell contends that CB recanted to Tammy, who was Bell's sister and CB's aunt. (R. 79:3.) Bell alleged that CB told Tammy that AC, not Bell, assaulted her. (R. 79:3.) Bell also claimed that CB told Tammy that AC told her to blame Bell for the assaults. (R. 79:3.) The basis for these allegations was an investigation by Bell's postconviction counsel. (R. 79:3.) Bell submitted no statements or affidavits from CB or Tammy with the motion. (R. 79.)

This Court should hold that these bare and unsupported allegations were not enough to require the circuit court to hold a hearing on Bell's claim.

To get a hearing, a defendant must allege facts in his postconviction motion that "allow the reviewing court to meaningfully assess [the defendant's] claim." *Allen*, 274 Wis. 2d 568, ¶ 21 (citation omitted). 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." *Id.* ¶ 23.

The allegations of CB's recantation in Bell's motion were too sparse to meet this standard. The motion alleged that CB recanted to Bell's sister "on multiple occasions." (R. 79:3.) But it did not explain any of the circumstances of the supposed recantation. The motion did not allege when the recantation happened or where. It did not explain if other

people heard it or why CB decided to recant. The motion also provided no information about how counsel learned about the recantation apart from a vague reference to an "investigation." (R. 79:3.) These bare-bones allegations were not enough to allow the circuit court to meaningfully assess Bell's claim or to require it to hold a hearing.

In addition, Bell's motion failed to satisfy the test for newly discovered evidence.

To start, there is no indication that the evidence was discovered after Bell's conviction. The motion does not explain when Bell learned about it other than to assert that it was after his conviction. (R. 79:5–6.) Bell could have easily alleged more precise information to explain when he learned about the supposed recantation. His failure to provide any detail should lead this Court to conclude that he has not proven this prong of the test.

Similarly, Bell fails the second prong of the newly discovered evidence test because he cannot show a lack of negligence in seeking CB's recantation. Again, the motion contained no allegations describing Bell's discovery of the recantation other than to say that it happened after Bell's conviction. (Bell's Br. 27.) Bell contends that he could not have discovered the recantation sooner because he was not allowed to have contact with CB. (Bell's Br. 26–27.) But CB recanted to Tammy. Bell does not claim that he was not allowed to contact his sister. And without any details about when Bell or his counsel learned about the recantation from Tammy, he cannot demonstrate a lack of negligence.

As for the third prong, the State admits that the evidence is material.

But Bell cannot satisfy the fourth prong because the evidence is largely cumulative. CB had already recanted once by the time Bell entered his pleas. (R. 79:13.) While she did not say then that AC was her assaulter or that he told her to

blame Bell, as argued, Bell knew before he pleaded no contest that he could try to blame AC for the crimes. There is little new information in CB's supposed recantation that was not in her old one or found in the rest of the record.

Further, CB's recantation is not corroborated. Bell contends that it shows a feasible motive for CB's initial accusation—her fear of AC. (Bell's Br. 27–28.) This is speculative. There is nothing in the allegations that shows that CB was scared of AC.

And there are no circumstantial guarantees that the recantation is trustworthy. Again, there is nothing in the motion giving any detail about the recantation, such as when or where CB made it. And Bell's motion contains almost no information about how he or his counsel uncovered this recantation. Further, Bell did not attach an affidavit or statement from Tammy or CB to the motion to corroborate the allegations. For that matter, the motion does not even allege that counsel or Bell spoke to Tammy about the recantations. There is thus little evidence to support the notion that Tammy even said that CB recanted, let alone evidence that would let a court determine if the recantation was reliable.

Bell asserts that this Court cannot truly determine the recantation's trustworthiness until after an evidentiary hearing. (Bell's Br. 28–31.) To get a hearing, though, Bell was obligated to provide at least some information in his motion bearing on the recantation's trustworthiness. There is none, so the circuit court properly rejected the claim without holding a hearing.

Finally, and for similar reasons, there is no reasonable probability that a jury would have found a different result had it known about CB's recantation. There really is no way for this Court to make this assessment without the circuit court's first holding an evidentiary hearing. At this point, though, there is so much missing from the record about CB's

recantation to know what to compare the existing evidence against. Bell was obligated to provide at least some of that information. He did not do so, and the circuit court properly denied this claim without a hearing.

CONCLUSION

This Court should affirm the circuit court's judgments of conviction and orders denying Bell's motions for postconviction relief.

Dated May 10, 2019.

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 6681 words.

Dated this 10th day of May 2019.

_____
AARON R. O'NEIL
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 10th day of May 2019.

_____
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