

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP959

Cir. Ct. No. 2000CF866

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WARREN A. MOFFETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Warren A. Moffett, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2005-06)¹ motion. Moffett claims the trial

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

court erred in summarily denying his postconviction motion in which he alleged that he received ineffective assistance of postconviction counsel. Because Moffett has failed to establish the requisite standards to warrant an evidentiary hearing on his ineffective assistance claims, we affirm.

BACKGROUND

¶2 In August 2000, a jury found Moffett guilty of three counts of second-degree sexual assault of a child. Moffett was sentenced and judgment was entered. In June 2001, Moffett filed a postconviction motion seeking a new trial on the grounds that trial counsel provided ineffective assistance for failing to object to the language of each sexual assault claim set forth in the information and the verdict. The trial court denied the motion and, in April 2002, we affirmed the judgment and order.

¶3 On March 30, 2006, Moffett filed a *pro se* motion alleging that postconviction counsel provided ineffective assistance. The trial court summarily denied the motion, concluding that “no prejudice resulted from counsel’s refusal or failure to raise” the claims Moffett raised. Moffett now appeals.

DISCUSSION

¶4 Moffett claims that his postconviction counsel provided ineffective assistance by failing to raise eight instances of trial counsel’s ineffective assistance.² Specifically, Moffett argues that trial counsel: (1) failed to

² Because ineffective assistance of postconviction counsel constitutes a sufficient reason under WIS. STAT. § 974.06(4) for not raising the issues in a direct appeal, the State does not argue that Moffett’s claims here are procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

adequately review discovery material five days before trial, which would have revealed an inconsistency in the official reports; (2) should have recognized that the chain of custody stipulation was erroneous; (3) should have subpoenaed Nurse Karen Hogan, who was the nurse that examined the victim; (4) failed to object when the State proffered Nurse Debra Donovan as the nurse who examined the victim; (5) should have objected when the State advised the jury that the substance in the victim's underwear was Moffett's saliva; (6) failed to object to "perjured testimony from Detective Kenneth Jones" regarding a condom found in Moffett's bedroom; (7) should have subpoenaed photos which would have corroborated Moffett's version of events as to how the knife found at the scene was broken; and (8) should have watched the videotapes, which were found in boxes with covers depicting people having sexual intercourse. We reject each of Moffett's arguments in turn.

¶15 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "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. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." *Id.* Stated another way, to satisfy the prejudice-prong, "[a] defendant must show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Sanchez*, 201 Wis. 2d at 236 (citation omitted).

¶6 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one component. See *Strickland*, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *Sanchez*, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *Id.* at 236-37.

¶7 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant's postconviction motion must allege with specificity both deficient performance and prejudice. *Id.* at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. *Id.* at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. *Id.* at 318.

¶8 Based on our review, we conclude the record conclusively demonstrates that there is no merit to any of Moffett's claims. Accordingly, the trial court did not err in summarily denying Moffett's ineffective assistance claim.

A. Discovery.

¶9 Moffett claims that trial counsel failed to sufficiently review the discovery material received five days before the trial date, which would have shown an inconsistency in the official reports. He asserts that the inconsistency was between a police report, which stated that an introitus swab contained stains collected from the victim, but that the police evidence list/specimen collection prepared by Nurse Hogan did not mention a stain.

¶10 Moffett's assertion here fails on the prejudice prong of the ineffective assistance standard. The introitus swab was not used as proof of Moffett's guilt because it did not contain any evidence that inculpated Moffett. The swab, which was tested for DNA, contained the victim's DNA, but not Moffett's DNA. Thus, the introitus swab was not an issue in the case, and any perceived inconsistency with respect to it did not have any prejudicial effect on Moffett. Accordingly, any alleged failure of trial counsel to review this evidence did not constitute ineffective assistance of counsel.

B. Stipulation.

¶11 Moffett claims his trial counsel should have discovered an error in the stipulation regarding the chain of custody for the items collected during the examination of the victim. The stipulation at issue provided:

[T]he defense in this case and the State of Wisconsin have stipulated that the evidence which was taken by Nurse Karen Hogan at the Sexual Assault Treatment Center on

February 13th of the year 2000 was turned over to a Terri Jordan who is a security officer at the Sexual Assault Treatment Center.

That evidence that was taken from [the victim] by Nurse Hogan was then turned over by Security Officer Natalie Giedt to a City of Milwaukee Police Officer, Joyce Johnson, and that evidence is detailed in Exhibit No. 20 which is City of Milwaukee Police Department Inventory No. 0122668, and that evidence was transported to the Wisconsin State Crime Laboratory for analysis, and I also have as Exhibit 19 the evidence attachment report from the Sexual Assault Center detailing what I have just stated in the stipulation.

Moffett asserts that the state crime lab evidence submission form states that Officer Scott R. Davis, not Officer Joyce Johnson (as indicated in the stipulation), delivered the evidence to the state crime lab. Although Moffett is correct that the form shows “PO Scott R. Davis” was the person who submitted the evidence to the crime lab, such does not render the stipulation erroneous. The stipulation does not identify who delivered the evidence to the state crime lab. Rather, the stipulation states only that Officer Johnson *received* the evidence from the security officer.

¶12 Moreover, Moffett failed to demonstrate how the alleged error prejudiced him. He asserts that his urine was taken from the garbage can in his room and at some point placed on the victim’s underwear. Such assertion, however, is not supported by any factual evidence in the record. The record demonstrates that the victim testified to urinating in the garbage can because there was no bathroom. The record does not indicate any evidence that Moffett urinated in the garbage can, nor does the record indicate that the police had access to Moffett’s urine to support an allegation that the police planted his urine on the victim’s underwear. Based on the foregoing, we conclude that Moffett has failed

to establish sufficient factual allegations to support his ineffective assistance claim relative to the chain of custody stipulation.

C. Failure to Subpoena Nurse Hogan.

¶13 Moffett contends that his trial counsel was ineffective for failing to call Nurse Hogan to testify regarding her written findings in her report following the physical examination of the victim. Hogan's report indicated that there were no lacerations to, or bruising of, the vulva and no lacerations to the hymen, that the vagina and cervix were within normal limits, and that the anus was intact. The report also noted that the physical examination of the victim's body revealed "no apparent distress nor injury."

¶14 We conclude that failure to call Nurse Hogan was not prejudicial because defense counsel elicited all of the information in Hogan's report from Nurse Donovan, who was called to testify. During cross-examination, defense counsel questioned Nurse Donovan about Hogan's examination of the victim and report. The jury heard Donovan confirm that Hogan had found "no apparent distress nor injury" to the victim's body, that there were no lacerations to, or bruising of, the vulva and no lacerations to the hymen. The jury heard Nurse Donovan testify that Hogan's report noted that the vagina and cervix were within normal limits, and that the anus was intact. Thus, defense counsel's failure to call Nurse Hogan did not prejudice the defense.

D. Nurse Donovan.

¶15 Moffett claims his trial counsel should have objected when the prosecutor stated in his opening statement that he was going to call Debra Donovan, who was "a nurse at the Sexual Assault Treatment Center, who did the

examination and took the evidence — gathered [the victim’s] clothing and other evidentiary items from her.” Moffett is correct that the prosecutor misinformed the jury in this regard during his opening statement.

¶16 However, the record reflects that Nurse Donovan, during her *testimony*, clearly informed the jury that it was Nurse Hogan who actually conducted the physical examination of the victim and prepared the report. The stipulation read to the jury also indicated that Nurse Hogan was the one who gathered the evidence. Under these circumstances, there is no reasonable possibility that the jury erroneously believed that Nurse Donovan was the one who actually conducted the examination. Moreover, the jury was instructed that any remarks by the attorneys are not evidence and that their decision must be based on the evidence. We presume the jury followed the instructions. *State v. Adams*, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). Based on the foregoing, there is no reasonable possibility that Moffett was prejudiced by the prosecutor’s erroneous remark made during his opening statement. Accordingly, Moffett’s contention that his trial counsel’s failure to object prejudiced him fails.

E. Failure to Object to Saliva Found on Underwear.

¶17 Moffett contends that trial counsel should have objected to the prosecutor’s remarks during closing argument with respect to Moffett’s DNA evidence identified in the victim’s underwear, which was presumed to be saliva.³

³ In his closing argument, the prosecutor stated:

(continued)

Moffett argues in his brief that trial counsel should have objected to this remark because the “crime lab analyst ... testified that the percentage to detect saliva was very low[, a]nd the evidence failed to show that the biological substance was saliva.”

¶18 Moffett’s argument refers to the testimony of crime lab analyst Gretchen DeGroot, who examined the items submitted for the presence of bodily fluids. DeGroot testified that she first examined the items with the naked eye, and after that looked at the items with a special light to detect bodily fluids. With respect to the victim’s underwear, the following exchange occurred:

Q And your result was?

A There’s no indication of biological fluids on there.

Q So that finding in and of itself would not support an accusation that there was protracted involvement between the mouth and her breasts. You would of expected to find some DNA if there were?

A I didn’t do the testing on the bra.

Q Would you expect to find evidence on the bra if that actively occurred?

A The ability of the light to detect saliva is not high.

The evidence from the crime scene corroborates that. Everything [the victim] said is proven at the crime scene. But there’s even more, and that’s the DNA evidence in this case, and although there’s a lot of innuendo, I think a lot of speculative questions, the simple fact of the matter is ... that Mr. Moffett’s biological substance --we assume it’s his saliva --was on her underwear, and it’s there.

And I asked the Crime Lab analyst “is your finding consistent with the report of [the victim] that the defendant licked her vagina, had oral sex with her? Are your findings consistent with that?” She said “yes, they are consistent.”

Q I'm just looking for a yes or no answer if you can give it to me?

A Would you repeat your question.

Q Would you expect to find some form of identifier in the bra if that occurred?

A If DNA was done, yes, I would expect that there would be some DNA types.

Moffett used DeGroot's statement that "the ability of the light to detect saliva is not high" to mean that the "percentage to detect saliva is low." That is an inaccurate analysis of the testimony. DeGroot's testimony indicated that it is difficult to detect whether saliva is present simply by a visual examination using the special light.

¶19 Moffett also fails to note what the evidence affirmatively showed. The victim testified that Moffett had mouth-to-vagina oral sex with her and then she later put her underpants back on. The state crime lab DNA analyst testified that the DNA sample taken from the victim's underpants was shown to be a mixture from both the victim's and Moffett's DNA. The analyst testified that it was "37 trillion times more likely that the DNA sample for the minor component on this underwear came from Warren Moffett than from some unknown random unrelated individual." The analyst further stated that the DNA findings were consistent with evidence that Moffett performed oral sex on the victim, after which the victim put her underwear back on.

¶20 Thus, the prosecutor's closing remark that Moffett's saliva was the source of Moffett's DNA found on the underwear was a fair argument based on the evidence and reasonable inference drawn therefrom. *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). Accordingly, Moffett's trial counsel's

failure to object to the prosecutor's remark did not constitute ineffective assistance of counsel.

F. Condom.

¶21 Moffett's next claim is that trial counsel should have objected and moved for a mistrial when the State "present[ed] perjured testimony from Detective Kenneth Jones pertaining to a condom that was said to have been found." Again, Moffett's argument fails.

¶22 The victim testified that she said, if he was "going to be doing this thing, you need protection." She took a condom from her purse and gave it to Moffett, who put it on. Detective Jones testified during direct examination that he found a empty condom wrapper in Moffett's room. The prosecutor then asked: "And did you find that condom?" to which the detective testified that he found it in a garbage can in Moffett's room.

¶23 Moffett claims that Jones lied because the actual condom was never found; rather, only the condom wrapper was found. The State argues that the detective did not lie and that either the transcription was erroneous or the prosecutor misspoke. In context, the State contends the exchange was clearly intended to address the condom wrapper, not the condom itself. In support of this argument, the State directs us to two additional questions and answers posed to the detective. Jones was asked by the prosecutor: "And you stated you found the knife and the condom wrapper in the garbage can, correct?" to which the detective responded: "Correct." Then, during cross-examination, the detective was asked: "You indicated that you found within the garbage can the condom wrapper and what appears to be either a saw or a knife?" to which the detective responded: "Yes."

¶24 Based on these exchanges, we agree with the State—clearly the detective indicated he found a condom *wrapper* not the condom itself. Moreover, the prosecutor in the closing argument references only the condom wrapper, not the condom itself. Thus, we conclude that trial counsel’s failure to object to the initial exchange did not constitute ineffective assistance of counsel. Three subsequent references informed the jury that the detective found only the condom wrapper.

G. Videotapes.

¶25 Moffett’s last argument is that his trial counsel provided ineffective assistance because he did not actually view the videotapes, which police found in Moffett’s apartment. The videotapes found were in boxes, which appeared to be commercially prepared pornographic videotapes as the covers had pictures of people engaged in sexual intercourse. Moffett contends that the tapes in these boxes were not actually pornographic and if trial counsel had watched the tapes, he would have discovered this fact. Then, counsel could have used this information to impeach the victim’s testimony that Moffett played a porn video during the assault to assist himself in getting an erection.

¶26 Moffett’s contention is based solely on a self-serving conclusory statement, and therefore is rejected by this court. The victim’s testimony was corroborated by the detective’s testimony that he found pornographic videotapes in Moffett’s apartment. Moffett’s claim that the videotapes in the boxes with pornographic covers were not actually pornographic is meritless. Moreover, if in fact there was any truth to Moffett’s assertion, he would have demanded that his trial counsel review the tapes and show them to the jury at the time of the trial.

The record provides no evidence that Moffett even asked counsel to review the tapes.

¶27 In sum, Moffett has failed to produce any evidence that he received ineffective assistance from his trial counsel. In turn then, postconviction counsel did not render ineffective assistance for failing to raise a claim of trial counsel's ineffective assistance during the direct appeal. We affirm the order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

