

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2009

David R. Schanker
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. 2008AP814-CR

Cir. Ct. No. 2006CF6287

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TYRONE DAVIS SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tyrone Davis Smith, *pro se*, appeals from a judgment of conviction and from orders denying his postconviction motion and motion to reconsider. He raises numerous issues, none of which provides a basis for relief. We affirm.

BACKGROUND

¶2 The State charged Smith with first-degree sexual assault of a child. The amended criminal complaint alleged that on or about November 23, 2006, Smith had sexual contact with Sasha T., a person who had not attained the age of thirteen years, contrary to WIS. STAT. § 948.02(1).¹ Smith denied the allegations, and the matter was tried to a jury.

¶3 At trial, the State presented three witnesses. Sasha T. testified that her date of birth is May 3, 1995. She told the jury that she awakened during the night of November 23, 2006, and realized that Smith was lying on top of her

¹ The complaint and information reference WIS. STAT. § 948.02(1), found in the 2003-04 version of the statutes. That statute provided: “[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.” Effective June 6, 2006, however, § 948.02 was amended. *See* 2005 Wis. Act 430, §§ 3-4; 2005 Wis. Act 437, §§ 1-2, 7. Because the offense in this case occurred in November 2006, it appears that the information and complaint properly should have contained references to WIS. STAT. § 948.02(1)(e) (2003-04) (as affected by 2005 Wis. Act 430). Nonetheless, the State’s failure to cite the amended statutory subsection did not prejudice Smith.

The version of WIS. STAT. § 948.02(1)(e) affected by 2005 Wis. Act 430, like the version affected by 2007 Wis. Act 80 that is currently in effect, provides: “[w]hoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.” Under both the prior and the amended versions of the statute, sexual contact with a person under thirteen years of age is a Class B felony carrying a maximum sentence of sixty years. Further, the prior and amended versions require proof of the same two elements to secure a conviction: (1) the accused had sexual contact with the victim; and (2) the victim was under the age of thirteen. *See* WIS JI—CRIMINAL 2102 (2002) and WIS JI—CRIMINAL 2102E (2008) (stating the elements of an offense under § 948.02(1)(e) (as affected by 2007 Wis. Act 80)). Thus, citation to the predecessor statute in the complaint and information was nothing more than a harmless technical error. *See State v. Wachsmuth*, 166 Wis.2d 1014, 1026-27, 480 N.W.2d 842 (Ct. App. 1992) (citation to successor statute mere technical error that did not prejudice defendant where prior and successor statutes contain identical elements); *see also* WIS. STAT. § 971.26 (2005-06) (no complaint or information is invalid by reason of a defect or imperfection that does not prejudice the defendant). Moreover, and perhaps most significantly for purposes of this appeal, Smith has never objected to the citations in the charging documents. Accordingly, any claim of error in this regard is waived. *See* WIS. STAT. § 971.31(2) (2005-06) (defects in charging documents are deemed waived unless raised before trial). All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

rubbing his penis against her clothed buttocks. Sasha T. stated that Smith was “going up and down,” and she described his penis as feeling like “a hard banana.” Sasha T. told the jury that she immediately woke her father, Hal S., and reported that Smith had tried to rape her. Hal S. testified that Sasha T. woke him during the night of November 23, 2006, “screaming and crying,” and that she accused Smith of attempted rape. Hal S. called the police after observing that Smith’s pants were unzipped. Smith cross-examined both Sasha T. and Hal S. about their prior inconsistent statements regarding the incident. Additionally, Smith demonstrated some discrepancies between Sasha T.’s recollection of events and Hal S.’s recollection.

¶4 Milwaukee police detective Phillip Simmert testified that he was on duty on November 23, 2006, and he interviewed Sasha T. in his squad car as part of his investigation of her assault accusation. Detective Simmert acknowledged that child victims of sexual assault are sometimes interviewed at the Sexual Assault Treatment Center at Children’s Hospital but he did not believe that he needed to use the treatment center to interview Sasha T. He explained that if a child is comfortable speaking with him, there is no reason to take the child to the treatment center or to arrange for a recorded interview with specially trained detectives. He testified that the Milwaukee police department does not have a policy or protocol dictating when a child should be interviewed at the treatment center.

¶5 Smith elected not to testify, and the defense rested without presenting any witnesses. In its closing argument, the State asserted that Sasha T.’s accusation was credible, and the State pointed to testimony that it believed corroborated the accusation. Smith’s closing argument highlighted the discrepancies and inconsistencies in the witnesses’ testimony.

¶6 The jury submitted two questions during its deliberations, one asking whether the charge could be “altered to a lesser degree” and a second asking if “misconduct” and “assault” are different. The parties and the court agreed to respond that “the only charge before you is the charge contained in the information. You must make your decision based upon the evidence and the law the court has given to you.”

¶7 The jury returned with a signed guilty verdict. In response to the circuit court’s request for the “not guilty” verdict form, the foreperson explained that she had thrown it away. The court then polled the jury, and each juror confirmed that he or she had voted to find Smith guilty. The circuit court denied Smith’s motion for judgment notwithstanding the verdict, and entered a judgment on the verdict. At sentencing, the circuit court imposed a fifteen-year term of imprisonment, bifurcated as ten years of initial confinement and five years of extended supervision.

¶8 Smith moved for postconviction relief. The circuit court denied the motion without a hearing and then denied Smith’s motion for reconsideration. This appeal followed.

DISCUSSION

¶9 We first consider Smith’s contention that the criminal complaint and information are defective because they do not allege a date certain for the crime. The charging documents allege that Smith sexually assaulted Sasha T. “on or about” November 23, 2006. According to the State, it could not allege a date certain because Sasha T. was asleep when the assault began and she does not know if Smith assaulted her before or after midnight.

¶10 Smith asserts that “it is not proper or sufficient” to allege that an offense occurred “on or about” a stated date, and in support he cites *Mau-zau-mau-ne-kah v. United States*, 1 Pin. 124, 130 (1841). The Wisconsin courts refined the rule stated in *Mau-zau-mau-ne-kah* in later decisions. “[W]here time of commission of a crime is not a material element of the offense charged, it need not be alleged with precision.” *State v. George*, 69 Wis. 2d 92, 96, 230 N.W.2d 253 (1975). The date of the offense is not a material element in the instant matter. “Time is not of the essence in sexual assault cases.” *State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

¶11 Smith asserts that uncertainty in the date alleged was prejudicial because “the dilemmas with the dates played to the credibility determination of the witnesses.” In fact, when the victim is a child, application of flexible notice requirements is particularly appropriate. *Id.* at 254. “The vagaries of a child’s memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance.” *Id.*

¶12 We next address Smith’s challenge to the conviction on the grounds that the evidence is “inconsistent and uncorroborated or unsubstantiated.” We review the sufficiency of evidence using a strict standard. We may not reverse a conviction on the basis of insufficient evidence “unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶13 Smith asserts that the victim’s description of events changed over time. He emphasizes the different terminology the victim used to describe the assault before and after she was interviewed by Detective Simmert, and he suggests that the accusation is particularly suspect because Detective Simmert did not record his investigative interview with the victim. The jury, however, had an opportunity to consider variations in the victim’s narrative. Moreover, on cross-examination, Smith developed the theory that Detective Simmert should have recorded the investigative interview, and the jury was free to consider whether lack of a recorded interview raised concerns about the victim’s accusations. The jury, and not this court, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. *Id.* at 506.

¶14 Smith further complains that the State failed to offer DNA evidence. Such evidence is not required to sustain a sexual assault conviction. *See State v. Holt*, 128 Wis. 2d 110, 120, 382 N.W.2d 679 (Ct. App. 1985). In sexual assault cases, “there is seldom any physical evidence implicating the defendant.” *State v. Davis*, 2002 WI 75, ¶18, 254 Wis. 2d 1, 645 N.W.2d 913.

¶15 The circuit court instructed the jury that it could not find Smith guilty unless the State proved beyond a reasonable doubt that: (1) Smith had sexual contact with Sasha T; and (2) Sasha T. had not attained the age of thirteen years. *See WIS JI—CRIMINAL 2102* (2002). We are satisfied that the testimony of Sasha T. and Hal S. permitted the jury to find that the State had met its burden. Accordingly, we reject Smith’s challenge to the sufficiency of the evidence. We also reject Smith’s related claims that the circuit court acted improperly when it denied Smith’s motions during trial to dismiss the case and to direct a verdict for the defense. *See Bere v. State*, 76 Wis. 2d 514, 524, 251 N.W.2d 814 (1977)

(both on appeal and on motion to dismiss for insufficient evidence, the issue is whether a trier of fact, acting reasonably, could make findings supporting guilt).

¶16 We turn to Smith’s contention that the jury should have been instructed on the lesser included offense of second-degree sexual assault as defined in WIS. STAT. § 948.02(2) (2003-04). That statute provides: “[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.” *Id.* “A lesser included offense means that all the statutory elements of [the lesser] offense can be demonstrated without proof of any fact or element in addition to those that must be proved for the greater offense.” *State v. Moua*, 215 Wis. 2d 511, 519, 573 N.W.2d 202 (Ct. App. 1997). The State acknowledges that second-degree sexual assault of a child is a lesser included offense of first-degree sexual assault of a child. *See id.* at 520. The State asserts that an instruction regarding a lesser-included offense nonetheless was not proper here, and we agree.

¶17 “If a reasonable view of the evidence can support a guilty verdict beyond a reasonable doubt for both the greater and the lesser included offense, then no lesser included instruction may be given.” *Id.* at 517. If, however, a reasonable view of the evidence supports a guilty verdict on the lesser-included offense but casts doubt on an element of the greater offense, both verdicts should be submitted. *Id.* at 518.

¶18 The victim of first-degree sexual assault must be under thirteen years old for the State to secure a conviction under WIS. STAT. § 948.02(1)(e) (2003-04) (as affected by 2005 Wis. Act 430). The victim of a second-degree sexual assault must be under sixteen years old for the State to secure a conviction under WIS. STAT. § 948.02(2) (2003-04). Both offenses include a second element, which

can be satisfied by proof of sexual contact. *See* §§ 948.02(1)(e) (2003-04) (as affected by 2005 Wis. Act 430) & 948.02(2) (2003-04). Therefore, if the State proves both that the defendant had sexual contact with a child and that the child was under thirteen, then the State has proved all the elements for both crimes. *See Moua*, 215 Wis. 2d at 519-20.

¶19 In this case, the parties did not dispute that the victim was eleven years old at the time of the incident. This undisputed fact supports a guilty verdict on either the greater or the lesser offense. *See id.* at 520. The State presented evidence of sexual contact, which could have sustained a guilty verdict as to either the greater or the lesser offense. Smith argued that the evidence was insufficient to prove sexual contact. Had the jury accepted Smith's argument, the jury could not have found guilt as to either the greater or the lesser offense. Accordingly, there is no reasonable view of the evidence that casts doubt on an element of the greater offense while also supporting a guilty verdict on the lesser offense. Pursuant to *Moua*, Smith was not entitled to an instruction on a lesser-included offense.²

¶20 Next, Smith alleges prosecutorial misconduct. He contends that the State made improper comments during closing argument by asserting that the evidence against Smith was credible and by highlighting testimony that corroborated the victim's accusations. Smith's contentions are wholly without merit. The prosecutor may tell the jury how he or she views the evidence. *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998).

² Smith also asserts that the circuit court "failed to instruct the jury that 'intentional' touching ... was required." In fact, the court did give such an instruction.

¶21 Smith next contends that the jury “exhibit[ed] reasonable doubt” when it returned its guilty verdict. He primarily relies on a statement allegedly made by a juror during a postverdict interview describing the jurors’ deliberative process. Pursuant to WIS. STAT. § 906.06(2), jurors may not testify regarding their mental processes in deliberations. Accordingly, the statement is not admissible and cannot be offered to impeach the verdict.

¶22 Smith also points to the jury’s inquiry during deliberations asking whether a lesser charge was available and to the foreperson’s actions in discarding the “not guilty” verdict form. Smith asserts that these factors demonstrate that the jury had a reasonable doubt as to his guilt. We disagree.

¶23 First, the jury was instructed that it could return a guilty verdict only if it was satisfied beyond a reasonable doubt of the defendant’s guilt. *See* WIS JI—CRIMINAL 140. We presume that jurors follow the circuit court’s instructions. *Adams*, 221 Wis. 2d at 12. Second, the circuit court polled the jury, and the jurors’ individual confirmations of the guilty verdict demonstrate that the verdict was both unanimous and freely given. *See State v. Kircher*, 189 Wis. 2d 392, 399-400, 525 N.W.2d 788 (Ct. App. 1994). We are satisfied that the verdict in this case reflects a unanimous finding of guilt beyond a reasonable doubt.

¶24 We turn to Smith’s contention that his trial attorney was ineffective and his related claim that the circuit court erred by failing to hold a hearing on this issue. To establish ineffective assistance of counsel, a defendant must show both deficient performance by counsel and prejudice as a result of the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, Smith must show that “counsel made errors so serious that counsel

was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” See *State v. Pote*, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 659 N.W.2d 82 (citation omitted). To prove prejudice, Smith must show “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.” See *Strickland*, 466 U.S. at 694. Smith must satisfy both the deficiency and the prejudice components of the test to be afforded relief. See *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. We may choose to examine either component first. *Pote*, 260 Wis. 2d 426, ¶14. If Smith’s showing is inadequate on one, we need not address the other. See *id.*

¶25 A defendant is not automatically entitled to a hearing on claims of ineffective assistance of counsel.

Whether a defendant’s postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Allen, 274 Wis. 2d 568, ¶9 (citations omitted).

¶26 Smith’s claim that trial counsel was ineffective by failing to request an instruction on second-degree sexual assault lacks merit. We have already concluded that Smith was not entitled to a jury instruction on second-degree

sexual assault. Accordingly, trial counsel did not err by failing to request such an instruction.

¶27 Smith next asserts that the State’s witnesses testified inconsistently and therefore trial counsel should have asked the circuit court to instruct the jury as to WIS JI—CRIMINAL 305, *Falsus In Uno*. This instruction provides: “[i]f you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may disregard all of the testimony of the witness which is not supported by other credible evidence in the case.” *Id.*

¶28 The *falsus in uno* instruction is not appropriate when discrepancies in the testimony are “most likely attributed to defects of memory or mistake.” *State v. Robinson*, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988) (citation omitted). Rather, the instruction may be given only if the circuit court finds something in the testimony of a witness “as would reasonably tend to show that the witness willfully swore falsely.” *Id.* at 282 (citation omitted). The circuit court has the opportunity to observe the witnesses, and its determination as to the propriety of giving the instruction is therefore entitled to “much weight.” *Id.*

¶29 In its order denying Smith postconviction relief, the circuit court determined that it would not have entertained a request by trial counsel for the *falsus in uno* instruction because nothing persuaded the court that any witness willfully gave false testimony. We defer to the circuit court’s credibility determinations unless those determinations are “based upon caprice, an [erroneous exercise] of discretion, or an error of law.” *Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (citation omitted). The record does not suggest that the circuit court’s determinations here

were improper. In light of the circuit court's assessment of the testimony, Smith was not prejudiced by his counsel's failure to request WIS JI— CRIMINAL 305.

¶30 Smith last asserts that his counsel performed deficiently by failing to retain an expert to testify regarding the suggestive questioning of children. His claim is conclusory and therefore insufficient to warrant relief. *See Allen*, 274 Wis. 2d 568, ¶15. Smith has not demonstrated who, if anyone, would have provided expert testimony, what the witness could say, or how that testimony would have assisted Smith's defense. *See id.*, ¶23 (reflecting that postconviction motions should allege facts that show "who, what, where, when, why, and how"). Smith appears to assume that an expert would be critical of the investigative interview of the victim in this case, but nothing in Smith's submission demonstrates the availability of a witness who would testify that the interview was improper in any way. Thus, Smith has not demonstrated any deficiency in his counsel's failure to retain an expert witness.

¶31 In light of the foregoing, we conclude that the circuit court committed no error in denying Smith's claims of ineffective assistance of counsel without conducting a hearing. For the reasons stated, we affirm.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

