COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP814-CR **Cir. Ct. No. 2003CF3931**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY JEFFERY HOEFT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN DIMOTTO, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. A jury found Randy Jeffery Hoeft guilty of one count of first-degree sexual assault of a child. *See* WIS. STAT. § 948.02(1) (2003-

04).[1] On appeal, Hoeft challenges the effectiveness of trial counsel, the sufficiency of the evidence, and the circuit court's denial of his pretrial motion to suppress a statement given to police after he took a computerized voice stress analysis (CVSA) test. We are not persuaded by Hoeft's arguments, and therefore, we affirm.

Background

¶2 The criminal complaint alleged that Hoeft sexually assaulted Amber J., the five-year-old daughter of his girlfriend. According to the complaint, Amber J. told her father that Hoeft "tried to stick the thing his pee comes from into my private area." The complaint also recounted statements made by Hoeft to the police. The complaint alleged that Hoeft told police that he was babysitting for Amber J., and let her sleep naked after she asked to do so. Hoeft laid in the bed in his boxer shorts. Hoeft hugged Amber J. and felt his penis get erect. Amber J. said, "You have a big crotch like my dad," and touched Hoeft's penis over his clothes. Amber J. asked to see his "crotch," and Hoeft took off his shorts and Amber saw his erect penis. Hoeft told police that he must have rolled over and his penis must have touched Amber J.'s vaginal area. Amber J. told Hoeft that she wanted to touch it. Hoeft told police that he let her touch it so she would go to sleep. Amber J. touched Hoeft's penis for about ten or eleven seconds until Hoeft told her that was enough.

¶3 At the time of the assault, Amber's mother, Sandra J., was separated from her husband, Amber J.'s father. At trial, Sandra J. testified that her estranged

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

husband was angry with Hoeft about their relationship. Anita O'Connor, a social worker, testified about her interview of Amber J., and the jury was shown the videotape of the interview. Detective Donald Krueger testified that Hoeft voluntarily took a CVSA test that revealed that Hoeft was being deceptive. Detective Krueger asked Hoeft some follow-up questions, and he "clarified a few things." Detective Krueger then read Hoeft his constitutional rights, and Hoeft gave the statements referred to in the criminal complaint. Additional facts will be stated below as necessary to address Hoeft's arguments.

Effectiveness of Trial Counsel

¶4 In his postconviction motion, Hoeft argued that his trial counsel did not fully investigate the case. The circuit court denied Hoeft's motion without an evidentiary hearing. We conclude that the circuit court did not err.

¶5 The two-pronged test for ineffective assistance of counsel requires the defendant to prove deficient performance of counsel and prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***Pitsch***, 124 Wis. 2d at 636-37. When evaluating counsel's performance, courts are to be "'highly deferential' and must avoid the 'distorting effects of hindsight.'" ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland***, 466 U.S. at 689). "'Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***Thiel***, 264 Wis. 2d 571, ¶19 (citation omitted). We indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637.

¶6 Before a circuit court is required to hold an evidentiary hearing on a claim of ineffective assistance of counsel, the defendant must raise factual allegations sufficient to raise a question of fact. *See* ***State v. Washington***, 176 Wis. 2d 205, 214-15, 500 N.W.2d 331 (Ct. App. 1993). In order for a defendant to prove counsel was ineffective for failing to investigate or present defense evidence, the defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). We review the defendant's motion *de novo* to determine whether it alleges facts sufficient to warrant an evidentiary hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). *See* ***State v. Tatum***, 191 Wis. 2d 547, 551, 530 N.W.2d 407 (Ct. App. 1995). If the motion fails to allege sufficient facts, the circuit court has the discretion to deny the postconviction motion without an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Thus, we will not reverse the circuit court's ruling unless it is an erroneous exercise of discretion. *See* ***id.*** at 311.

¶7 In the postconviction motion, Hoeft complained that his trial attorney "did not fully communicate with him," and was "unprepared" and "unfamiliar with the case," asking "uncertain questions." Hoeft alleged that "throughout the trial," his attorney "would continue to ask him what question's [sic] to ask the witnesses."

¶8 Hoeft's postconviction motion did not allege sufficient facts. Although Hoeft complained about the level of counsel's preparedness, he did not show "with specificity" what his attorney should have done, but did not do, because of inadequate preparation. *See* ***Flynn***, 190 Wis. 2d at 48. Hoeft did not

show what a better-prepared attorney would have done or how it would have altered the outcome of the trial. *See* ***id.***

¶9 In the postconviction motion, Hoeft also complained that his trial attorney "did not call the child's father, David J." Hoeft asserted that David J. "was the individual who reported this incident to the police and was not cooperative with the police." Hoeft concluded that "[p]resenting David J. may have presented reasonable doubt."

¶10 When a defendant is claiming that trial counsel was deficient for failing to locate and present testimony from a witness, the defendant must allege with specificity what the witness would have said if called to testify. *See* ***id.*** Hoeft's motion did not provide the circuit court with any clue as to what David J. would have said if he had been called to testify. Hoeft's motion was wholly conclusory. The circuit court did not erroneously exercise its discretion when it denied Hoeft's postconviction motion without an evidentiary hearing.

¶11 Lastly, Hoeft's postconviction motion alleged that trial counsel "did not further pursue a possible defense" regarding Amber J.'s exposure to a pornographic video that was owned by Hoeft. In the motion, Hoeft suggested that "reasonable doubt" would have been created because the information "would have provided an explanation to the jury why [Amber J.] knew of the sex act."

¶12 When this topic was broached during trial, Hoeft's attorney stated that he had considered whether to introduce evidence of Hoeft's pornographic videotapes as an alternative source of Amber J.'s sexual knowledge. Counsel stated that pornography touches "a very charged emotion with people," with some people accepting it and other people viewing it as "very evil." Counsel stated that

he "did not want to bring that issue, that charged issue into a jury" and risk "alienat[ing] jurors" against the defendant. Counsel stated that he had discussed the issue with Hoeft and that they were "choosing not to bring up any mention of the pornographic tapes … or of [Amber J.] ever watching and accidentally observing pornographic tapes." The record shows that Hoeft nodded agreement with counsel's statements.

¶13 A trial attorney's selection of trial tactics in the exercise of professional judgment is "substantially the equivalent of the exercise of discretion." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). When the record shows that trial counsel made a strategic decision based on the facts and the law which is reasonable under the circumstances, we do not second guess that decision. *See* ***id.*** Because the decision not to introduce evidence that Amber J. may have viewed pornographic videotapes owned by Hoeft was a strategic trial decision that was reasonable under the facts, trial counsel's performance was not deficient.

Sufficiency of the Evidence

¶14 On appeal, Hoeft argues that there was insufficient evidence to convict him of first-degree sexual assault of a child. Specifically, Hoeft asserts there was no evidence that he "had contact with [Amber J.] to become sexually aroused or gratified." Hoeft argues that "even if" he had contact with Amber J., it "was not done for sexual enjoyment." We are not persuaded.

¶15 Hoeft's statements to police were introduced at trial through the testimony of Detective Krueger. In a written statement, Hoeft admitted that while babysitting Amber J., he "had been doing some drinking" but that he was "not …

sloppy drunk." Hoeft stated that Amber J. "wouldn't go to sleep" and "wanted to go to sleep in mom's bed." Hoeft said that they "went to the bedroom" and he "undressed to [his] boxer shorts [and] laid down." Amber J. asked to "sleep naked like she does with her dad, and she took off her clothes and got under the covers, and we kind of cuddled/hugged." Hoeft said that Amber J. told him he "had a big crouch [sic]" and she "reached and touched my penis which was hard from the close contact." Hoeft said that Amber J. "wanted to see" his penis so he "took off" his boxer shorts and Amber J. "looked at it and touched it not in a sexual way but just curious. Then we just cuddled."

¶16 Detective Krueger also testified that Hoeft had provided "a little more detail" in an oral statement. According to Detective Krueger, Hoeft said that after Amber J. took off her clothes and got into her mother's bed, she "cuddled up to him" and he "had his arm around her." Hoeft told Detective Krueger that "he had an erection because of the close contact." Hoeft said that Amber J. "reached into the hole in the front of his boxer shorts and touched his erect penis, and she began giggling." According to Hoeft, Amber J. asked him to "sleep naked" so "he removed his boxer shorts, and she continued to touch his penis … for approximately three to four minutes." Hoeft admitted that his penis "probably touched" Amber J.'s vaginal area, but "quickly added that he did not deliberately rub it against her … [or] try to penetrate her."

¶17 Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451

N.W.2d 752 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. *See* ***State v. Witkowski***, 143 Wis. 2d 216, 223, 420 N.W.2d 420 (Ct. App. 1988). Intent may be inferred from the conduct and general circumstances of the case. ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987). We must accept the inference drawn by the finder of fact. *See* ***id.***

¶18 We agree wholeheartedly with the following statement in the State's brief:

> [T]he jury was entitled to draw the reasonable inference that Hoeft, an adult man, who hugged and cuddled in bed with a five-year-old girl while naked, got an erection, allowed the child to touch his erect penis for an extensive period of time, maintained the erection, and touched the child's vaginal area with his penis, did so for the purpose of becoming sexually aroused or gratified.

¶19 The jury's verdict rests upon reasonable inferences drawn from credible evidence. Sufficient evidence supports the guilty verdict.

Suppression Motion

¶20 Hoeft argues that the circuit court should have suppressed statements made by Hoeft after Detective Krueger told him that the results of the CVSA test

suggested that Hoeft was being deceptive. Hoeft argues that "the totality of the circumstances" show that Hoeft's statement was not voluntary.[2]

¶21 The parties and the circuit court have analyzed this issue using the legal standards pertinent to statements after a voluntary polygraph examination.[3] The analogy is persuasive, and therefore, we also look to the polygraph cases for guidance. The results of a polygraph examination are not admissible at trial and a defendant's statements made during a polygraph examination are not admissible. ***State v. Schlise***, 86 Wis. 2d 26, 42-44, 271 N.W.2d 619 (1978). Statements made after the examination is completed, however, may be admissible. ***State v. Greer***, 2003 WI App 112, ¶9, 265 Wis. 2d 463, 666 N.W.2d 518. If the post-examination statements are "so closely related to the mechanical portion of the polygraph examination that it is considered one event," then the post-examination statements are not admissible. ***State v. Johnson***, 193 Wis. 2d 382, 388, 535 N.W.2d 441 (Ct. App. 1995). Statements given after the examination may be admissible, however, if they are "distinct both as to time and content" from the preceding examination. ***Id.*** This determination is made on a case-by-case basis, after consideration of the totality of the circumstances. ***Id.*** at 388-89.

¶22 Among the relevant factors are the time between the end of the examination and the interview during which the statements were given; whether

---

[2] In his brief, Hoeft makes the broad assertion that the circuit court "erroneously decided the ***Miranda/Goodchild*** issue in this matter." Hoeft made several statements to police at several points in time. Hoeft does not develop an argument as to any of the statements other than those made after the CVSA test was given. Therefore, we do not consider whether any of Hoeft's other statements should have been suppressed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (Arguments unsupported by legal authority will not be considered.).

[3] The circuit court described the CVSA test as a "new polygraph-type test done with the voice rather than through other biometric indicia that are used in polygraph tests."

the defendant was still attached to the testing equipment when the statements were made; whether the post-examination interview was in a different room; whether the defendant was told that the examination was over; and whether the examiner's interrogation of the defendant is based on the just-obtained examination data. ***Greer***, 265 Wis. 2d 463, ¶11. The "core factors" are whether the examination was over when the defendant made the statements and whether the defendant was so told. ***Id.***, ¶12.

¶23 The circuit court's factual findings will be upheld unless clearly erroneous and the application of constitutional principles to the evidentiary and historical facts is a question of law that this court reviews independently of the circuit court's determination. *See* ***id.***, ¶9.

¶24 In this case, the circuit court made the following findings of fact. Hoeft agreed to take the CVSA test voluntarily. The detective administering the test, Detective Stein, did not advise Hoeft of his ***Miranda***[4] rights. Detective Stein hooked up the equipment and conducted the test. He then unhooked Hoeft from the equipment and told him that the test was over. Hoeft was taken from the examination room and led to the civilian waiting area in the police station. The circuit court expressly found that Hoeft was not in custody at this point in time.[5] The circuit court found that approximately one hour elapsed between the end of the CVSA test and the subsequent interview.

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[5] Hoeft does not challenge that finding.

¶25 Detective Stein examined the results of the test and concluded that Hoeft had been deceptive and untruthful and told Detective Krueger of the results. Detective Krueger then brought Hoeft into a different interview room, and they were joined by Detective Stein. Detective Krueger told Hoeft that he had a few more questions about their previous conversations.[6] Detective Krueger also asked Hoeft about some of the answers he had given on the CVSA test. Hoeft then told Detective Krueger there were some things he wanted to say that he had not previously mentioned, and Hoeft made an admission to the incident alleged by Amber J. Detective Krueger then read Hoeft his ***Miranda*** rights.

¶26 The circuit court considered ***Schlise***, ***Johnson*** and ***Greer***. The circuit court noted this was a "close question" because "under the totality of circumstances' review there are things that fall on both sides of the equation." The circuit court identified several facts that suggested that the subsequent interview was a distinct event—Hoeft was not attached to the examination equipment, Detective Stein told Hoeft that the examination was over, and the post-CVSA interview took place one hour later in a different room. On the other hand, the circuit court noted that Detective Stein was present during the post-CVSA interview, that Hoeft had been told he had failed the test, and Detective Krueger referred to the CVSA results in some of his questions. The circuit court concluded that "on balance" the post-CVSA interview was a distinct event and denied Hoeft's motion to suppress.

[6] Hoeft had given a statement to Detective Krueger approximately one month before the CVSA test was administered.

¶27 The circuit court's factual findings are not clearly erroneous and we are bound by them. We agree with the circuit court's application of the law to those facts. Although Detective Stein was present during the interview and Detective Krueger made some references to the content of the CVSA test, the "core factors" identified in ***Greer*** compel the conclusion that the post-CVSA interview was a distinct and separate event. The CVSA examination was completed, and Hoeft was told that it was over. *See* ***Greer***, 265 Wis. 2d 463, ¶12. As in ***Greer***, the post-CVSA interview, "from a purely spatial and temporal standpoint," was not "so closely associated with" the CVSA test that it must be considered a single event. ***Id.***, ¶14. Therefore, the circuit court properly denied Hoeft's suppression motion.

By the Court.—Judgment and order affirmed.

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