COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0129-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN M. ALBRECHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. John Albrecht appeals a judgment convicting him of three counts of second-degree sexual assault of a child, and an order denying postconviction relief. Albrecht argues that he was deprived of effective assistance of counsel, that he was denied the opportunity to be present at all of the

proceedings, and that the court erroneously exercised its sentencing discretion. We reject his arguments and affirm the judgment.

The victim, born in March 1979, testified that between the winter months of 1993 through the spring of 1994, she lived at the home of a girlfriend. Her friend's parents supplied her with alcohol. The friend's father began to write notes to her that he liked her. He told her he cared about her. She testified that every once in a while he would "grab my butt or something." Eventually, he engaged her in sexual intercourse on four occasions.

On cross-examination, defense counsel inquired whether she had told law enforcement officers that Albrecht had watched her in the shower. She answered that Albrecht had done so a few times. Defense counsel also asked whether she had accused her own father of watching her in the shower when she was living at home. She denied it.

Defense counsel then asked the victim to review a letter dated March 20, 1994, and marked as exhibit one, that stated that her father had walked in on her while she was in the shower. She denied that she had written the letter. She said that it did not look like her handwriting. Defense counsel chose not to offer the letter into evidence.

During the trial, Jason Dougan testified that while in jail he was housed in the same cell as Albrecht and he overheard Albrecht on the phone in the cell tell his daughter that "they don't have nothing on him because they got the dates wrong, and that they can't do nothing about it because the dates are wrong." Albrecht testified in his own defense that he did not have sexual intercourse with the victim at any time. The jury returned a guilty verdict on all four counts.

Albrecht argues that he was deprived of effective assistance of counsel. The right to counsel "is meant to assure fairness in the adversary criminal process." ***United States v. Morrison,*** 449 U.S. 361, 364 (1981). To demonstrate ineffective assistance of counsel, a defendant must show counsel's deficient performance and that the deficient performance prejudiced the defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). To establish deficient performance, it must be shown that "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. With respect to prejudice, the test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. "The 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." ***Id.*** at 694.

Ultimately, the reasonableness of the attorney's conduct and whether it was prejudicial to the defense are questions of law that the appellate court must determine independently. ***State v. Pitsch,*** 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985). A defendant's failure to establish either the deficiency component or the prejudice component is dispositive. ***Strickland,*** 466 U.S. at 697.

Albrecht contends that his defense counsel's performance was deficient in several ways. We do not address the alleged deficiencies because Albrecht fails to establish prejudice. First, Albrecht argues that defense counsel failed to voir dire the jury as to recent publicity. He argues that a member of the jury was related to and employed by the owner of a local weekly paper. Prospective jurors are presumed impartial, and one challenging this presumption bears the burden of proving bias. ***State v. Louis*****,** 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990). There is no suggestion, however, that the publicity was

known to jurors or that it in any way influenced their deliberations in this case. During voir dire, the trial court asked the panel whether anyone had heard or read anything about the case, and no one responded. The court asked whether anyone had a feeling of bias or prejudice and no one responded. Absent a showing that the pretrial publicity influenced the deliberations, Albrecht suffered no prejudice.

Next, Albrecht argues that defense counsel was ineffective for failing to file a discovery demand that would have disclosed Dougan's testimony. Without addressing whether it was deficient performance not to file the discovery demand, Albrecht fails to show that the discovery of the witness's testimony would have affected the outcome of the trial. Absent a showing that the knowledge of the witness's testimony would have somehow altered the course of events, he has not shown that he was prejudiced for failure to discover the existence of the witness.

Albrecht also argues that defense counsel was ineffective for failing to request the transcription of the opening and closing arguments. Albrecht fails to show a need for the transcripts. A defendant must show "there is some likelihood that the missing portion would have shown an error that was arguably prejudicial." ***State v. Perry***, 136 Wis.2d 92, 103, 401 N.W.2d 748, 753 (1987). Albrecht fails to allege that anything improper occurred during the opening and closing statements. Without such allegation, the prejudice component is absent.

Further, Albrecht argues that defense counsel was ineffective because he failed to move for the admission of exhibit one, the letter purportedly written by the victim. The information in this exhibit came in through the victim's testimony during the course of the trial. Albrecht fails to show that the failure to admit the exhibit prejudiced the defense.

Next, Albrecht argues that trial counsel was ineffective for failing to obtain the victim's medical records. A defendant who seeks access to a witness's medical records must first make a preliminary showing that the evidence is relevant and necessary to a fair determination of guilt. ***State v. Behnke,*** 203 Wis.2d 43, 49, 553 N.W.2d 265, 269 (Ct. App. 1996). In order to make this showing, the defendant must establish more than a mere possibility that the records may be helpful. ***Id.*** Here, Albrecht fails to show that the medical records contain relevant or exculpatory evidence. Because he has not demonstrated prejudice, his claim must fail.

As his final challenge to counsel's effectiveness, Albrecht argues that defense counsel was ineffective for failing to request an adjournment to confer with a child witness that defense counsel chose not to have testify. This decision appears to be a strategic decision not subject to our review. In any event, Albrecht fails to show what relevant testimony the child could have offered. In his brief, he argues that the child could have testified, among other things, that Albrecht was never alone with the victim. Without addressing the foundation problems for this type of testimony, we note that the record citation Albrecht offers fails to support his contentions. We do not sift the record for facts to support a party's argument. ***Keplin v. Hardware Mut. Cas. Co.,*** 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964). Consequently, we reject the argument.

Next, Albrecht argues that he was denied the right to be present at all proceedings. He claims that he was not present at a scheduling conference that set the trial date. He claims that he would have objected to the trial date because a witness had not yet been located. Because Albrecht fails to offer any support to his contention that a defendant has a right to be present at scheduling conferences,

see § 971.04, STATS., and because Albrecht fails to identify any critical testimony that was unavailable at trial, we reject the argument.

Finally, Albrecht argues that the trial court erroneously exercised its sentencing discretion. We disagree. On three counts, Albrecht received three seven-year terms, to be served consecutively, and consecutively to terms he was then serving. On the fourth count, he received a ten-year prison term, stayed, and ten years probation imposed. The trial court considered the seriousness of the offenses, the need for deterrence, his severe drug and alcohol problems, his employment instability, his criminal record, including a strong-armed robbery he committed while on bond for the offenses in this case, the danger he poses to the community and the need for punishment. These are appropriate factors. *See* ***Ocanas v. State,*** 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). The extremely serious nature of the offense and Albrecht's criminal record support the trial court's determination that probation is not appropriate until a lengthy prison term has been served.

By the Court.—Judgment and order affirmed.

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