COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1119-CR **Cir. Ct. No. 2009CF602**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLAUDE J. POTVINE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Claude Potvine appeals a judgment convicting him of first-degree sexual assault of a child, as well as an order denying his postconviction motion. On appeal, Potvine argues that his trial counsel provided ineffective assistance and that he should be granted a new trial in the interest of

justice. For the reasons set forth below, we affirm the judgment and order of the circuit court.

¶2 Potvine was convicted, following a jury trial, of the first-degree sexual assault of his girlfriend's daughter, C.G., who was then eleven years old. He was sentenced to a prison term of forty years, consisting of thirty years of initial confinement and ten years of extended supervision. On appeal, Potvine argues that his counsel was ineffective for failing to move to strike a juror, failing to object to the testimony of one of the State's witnesses, and failing to object during the State's closing argument and move for mistrial.

Failure to Strike the Juror

¶3 We will first address Potvine's argument that his counsel was ineffective for failing to move to strike one of the jurors for lack of impartiality. A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

¶4 A juror stated during voir dire that he was a student worker with the Minnesota Department of Corrections and worked with the commissioner on sex offender management programs. When asked whether his background would make it difficult for him to listen to testimony and focus on the trial, the juror answered that it would not, but also stated that he would "probably use [his] level of expertise in a way, too."

¶5 Potvine filed a postconviction motion alleging that his trial counsel was ineffective for failing to remove the juror. The circuit court held a ***Machner***[1] hearing at which trial counsel testified that he did not hear the juror's answers and would have removed the juror if he had heard them. The circuit court concluded that, by failing to remove the juror, trial counsel "failed to meet the standard of reasonably proficient representation." The circuit court went on to conclude that Potvine was not prejudiced because there was "nothing in the record that would suggest that [the juror] was anything other than a 'reasonable person' who would make every effort to be fair and impartial."

¶6 On appeal, Potvine challenges this ruling. He argues that his trial counsel should either have stricken the juror for cause or exercised a peremptory strike. Potvine argues that the juror had a pro-prosecution bias and that the juror's being allowed to sit on the jury resulted in prejudice to his defense. The State does not challenge the circuit court's ruling that the juror's trial counsel performed deficiently, but it asserts that defense counsel's failure to question the juror about his work history provides a better basis for that conclusion. The State agrees with the circuit court, however, that Potvine failed to demonstrate prejudice.

¶7 Potvine does not specify whether the juror's purported bias was statutory, subjective, or objective. *See* ***State v. Oswald***, 2000 WI App 3, ¶4, 232 Wis. 2d 103, 606 N.W.2d 238 (a juror may be statutorily biased, objectively biased, or subjectively biased). Most of the cases Potvine cites in his brief involve claims that the juror was objectively biased. *See, e.g.*, ***State v. Tody***, 2009 WI 31, 316 Wis. 2d 689, 764 N.W.2d 737 (presiding judge's mother was an objectively

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

biased juror because she had an interest in the case via her familial relationship with the judge), *abrogated by* ***State v. Sellhausen***, 2012 WI 5, 338 Wis. 2d 286, 809 N.W.2d 14; ***State v. Liddell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223 (juror who had a close, long-standing relationship with the homicide victim was objectively biased); ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999) (juror who knew a prosecution witness and repeatedly expressed his view that he considered the witness's credibility to be unimpeachable was objectively biased). None of these cases involved a juror who, like the juror here, was alleged to be biased as a result of former employment.

¶8 Potvine also cites ***State v. Traylor***, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992), in support of his argument that, once he established that the juror was biased and that he was impaneled, nothing more was required to prove his counsel's ineffectiveness. We disagree with Potvine's interpretation of ***Traylor***. Although the opinion in ***Traylor*** uses the words "ineffective" and "deficient" somewhat interchangeably, we agree with the State's analysis of that case. When read in context, the conclusion in ***Traylor*** was that counsel's performance was deficient because he failed to strike a prospective juror, but that no prejudice was shown and, thus, the claim of ineffective assistance of counsel failed for lack for prejudice. *See* ***Traylor***, 170 Wis. 2d at 399-401.

¶9 A lawyer's failure to act to remove a biased juror who ultimately sat on the jury constitutes deficient performance resulting in prejudice to his or her client. ***State v. Carter***, 2002 WI App 55, ¶15, 250 Wis. 2d 851, 641 N.W.2d 517. However, Potvine has not shown that the juror here was a biased juror. During voir dire, after the juror stated that his brother was a deputy sheriff with the La Crosse Police Department, Potvine's counsel asked the juror whether he tended "to look at life leaning one way towards prosecution." The juror answered "No."

When asked a follow-up question about whether he could be fair, the juror answered in the affirmative. Potvine did not call the juror to testify at the postconviction motion hearing to ask the juror any follow-up questions to determine whether there was any reason to suspect that the juror was biased, despite his statement during voir dire that he could be fair. The burden is on the defendant to show both deficient performance and resulting prejudice. ***State v. Koller***, 2001 WI App 253, ¶12, 248 Wis. 2d 259, 635 N.W.2d 838, *holding modified on other grounds by* ***State v. Schaefer***, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760. Potvine has not met that burden here. We need not decide whether Potvine's counsel performed deficiently during voir dire because we conclude that Potvine has failed to show prejudice. *See* ***id.***

Failure to Object to Testimony of Investigator Mahairas

¶10 At trial, the State presented the testimony of Investigator Jason Mahairas about his interview of Potvine regarding C.G.'s statements incriminating him. Mahairas testified that Potvine was "nonreactive" after Mahairas informed him of the allegations, meaning that Potvine's demeanor did not change after he was told about the statements. Potvine argues on appeal that his trial counsel was ineffective in failing to object to the testimony. He argues that the testimony was inadmissible because it was tantamount to Mahairas offering the jury an opinion that Potvine was guilty.

¶11 Under ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." We agree with the State that Mahairas' testimony about Potvine's demeanor did not violate the ***Haseltine*** rule. Mahairas did not opine about

whether Potvine was telling the truth. He merely described his observation of Potvine's demeanor without any commentary about what his demeanor meant. Because the testimony was not improper, Potvine's counsel was not deficient for failing to object to it.

¶12 Potvine also argues that his counsel should have objected when the prosecutor asked Investigator Mahairas whether Potvine saw the videotape of C.G.'s interview or asked to see it. Potvine argues that this line of questioning misled the jury to inferring that Potvine could have seen the video if he had asked. However, we are satisfied that any such inference was dispelled when Potvine's counsel elicited testimony from Mahairas on cross-examination that the investigator never told Potvine that there was such a video, and did not have an obligation to tell him. We conclude that Potvine's counsel was not deficient for failing to object to Mahairas' testimony about whether Potvine saw or asked to see the videotape.

Failure to Object During the Prosecutor's Closing Argument

¶13 Potvine argues that his trial counsel was deficient for failing to object to several remarks during the prosecutor's closing arguments. Specifically, he argues that the prosecutor improperly argued that Potvine "corroborated" C.G.'s version of what had occurred. The prosecutor went on to say that Potvine lived with C.G.'s mother, that Potvine and the mother argued, that Potvine had to sleep on the porch, and that Potvine moved out in July of 2008, and that C.G. had said the same things. The record supports the prosecutor's statement that Potvine corroborated these facts. Mahairas testified that when he interviewed Potvine, Potvine admitted that he had been in a relationship with C.G.'s mother and that the relationship had started to dwindle. Mahairas testified that Potvine admitted that

he had to stay on the porch and that he eventually left the residence in July 2008. Given that the record supports the prosecutor's statement that these details were corroborated by Potvine, we agree with the State that there was no basis for an objection by his counsel. Therefore, we conclude that Potvine's counsel was not deficient for failing to object to the statements. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").

¶14 Potvine also argues that his counsel should have objected when the prosecutor stated in her closing argument that "trial prep is done individually, separately, not together, not with all the witnesses in the same room." Potvine argues that his counsel should have objected because this statement was based on the prosecutor's personal knowledge rather than the evidence. The circuit court concluded that defense counsel was deficient for not objecting, but that Potvine was not prejudiced.

¶15 Assuming without deciding that it was deficient for Potvine's counsel not to object to this arguable "testimony" by the prosecutor, we conclude that any error by counsel in this regard does not undermine confidence in the outcome. Potvine fails to develop an argument that an objection by counsel to this statement would have resulted in a curative instruction that might have affected the outcome or that an objection would have resulted in a mistrial.

¶16 We next address Potvine's argument that his counsel performed deficiently when he failed to object to the prosecutor's assertion that Potvine was "melancholy" when Mahairas interviewed him. The State agrees with Potvine's assertion that there was no basis in the evidence for that characterization of his

demeanor. However, we agree with the State that, although the "melancholy" characterization was not supported by the evidence, Potvine has not showed that he was prejudiced by it. The court instructed the jury that "[r]emarks of the attorneys are not evidence. If the remarks suggest certain facts not in evidence, disregard that suggestion." A jury is presumed to follow the instructions given to it, and Potvine has not provided any explanation to overcome that presumption. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) ("We presume that the jury follows the instructions given to it.").

¶17 Finally, we address two closely related arguments Potvine makes of ineffective assistance by his trial counsel. First, Potvine contends that his counsel deficiently failed to object to the prosecutor's statement that Potvine did not "speak to Investigator Mahairas in a manner that's consistent with innocence." Second, Potvine contends that his counsel was ineffective for failing to elicit testimony from Mahairas that Potvine denied the sexual assault allegations as indicated in Investigator Mahairas' report from his interview with Potvine, which include the following statement: "Claude stated that the allegations made against him are false."

¶18 The circuit court concluded that defense counsel was deficient both for failing to elicit testimony from Mahairas regarding Potvine's denial of the allegations and for failing to object to the prosecutor's remark during her closing statement that Potvine did not speak to Mahairas in a manner consistent with innocence. However, the court also concluded that Potvine was not prejudiced by these deficiencies. For the reasons discussed below, we come to the same conclusions.

¶19 To satisfy the prejudice prong of the test for ineffective assistance of counsel, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 694. Potvine has not made such a showing. Even when counsel's deficiencies are taken into consideration, the evidence at trial so strongly supported the view that Potvine is guilty that we are confident the outcome was unaffected by counsel's deficient performance.

¶20 The jury viewed a videotaped interview of C.G. conducted by a social worker. During the interview, C.G. stated that she awoke one night at 3:00 a.m. to go to the bathroom, when she encountered her mother's boyfriend, Potvine, who said he wanted to talk to her. C.G. said that her mother was sleeping downstairs because Potvine and her mother had had an argument. C.G. testified that Potvine asked her to come into his bedroom, and that she did so and sat on the edge of the bed. C.G. recalled that Potvine told her to take her bottoms off, and so she removed her bottoms and underwear. She said that Potvine then held her by the arms and used his mouth to suck her for about ten minutes "where you go pee." C.G. stated that her mother came up the stairs and "kind of seen" what happened, and that her mother was angry and made Potvine sleep outside. C.G. spoke with her mother a "tiny bit" about what happened. Other than her mother, C.G. said that the first person she told about what happened was her brother.

¶21 The brother, who is one year older than C.G., also testified that Potvine had been living with them and dating their mother. He testified that his sister said that "Claude tried to have sex with her orally." The State also presented testimony from C.G.'s stepmother. The stepmother testified that she spoke with C.G. about the incident after she heard from one of her sons that the brother had told her son that Potvine had touched C.G. The stepmother testified that C.G. told

her that Potvine had touched her and that her mother knew about it. The stepmother further stated that C.G. has "always been honest" with her.

¶22 Considering all of the above, we agree with the State that it is unlikely the jury would have given any weight to Potvine's statement to Mahairas denying C.G.'s allegations and that, therefore, we are satisfied that Potvine was not prejudiced by his counsel's deficiencies with respect to that issue.

¶23 Potvine requests discretionary reversal on the basis that the real controversy was not fully tried. *See* WIS. STAT. § 752.35 (2011-12). However, because we have concluded that Potvine was not prejudiced by his counsel's deficiencies, we decline to exercise our power of discretionary reversal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).