COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1748-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE TREVINO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN STORCK, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Jose Trevino appeals from his judgment of conviction for three counts of second-degree sexual assault of a child in violation of § 948.02(2), STATS., and from the order denying his motion for postconviction relief. Trevino contends his Sixth Amendment rights to confrontation and compulsory process were violated when the trial court denied Trevino the

opportunity, under the rape shield statute, § 972.11(2), STATS., to present evidence of a prior assault against the victim. Trevino also argues that his right to effective assistance of counsel was violated because his trial counsel did not properly impeach the State's primary witness and failed to request that opening and closing arguments be recorded. We disagree and affirm the trial court's rulings.

BACKGROUND

Trevino was convicted by a jury of having sexual intercourse and sexual contact with Megan F., who was less than sixteen years old at the time of the alleged assaults. Megan testified that Trevino lived with her and her mother, Teresa F., in Texas, Iowa, and Wisconsin over a seven-year period. Megan described many occasions when her mother was not home when Trevino would molest her. She recounted that he "would play with my vagina and suck on my breasts," insert his fingers and his penis into her vagina, and "he stuck his penis in my mouth." Trevino would then threaten to hurt her or kill her if she told anyone. Megan specifically described three such instances that occurred in Wisconsin on or about April 3, 1994; November 5, 1995; and November 8, 1995.

Prior to trial the prosecutor brought a motion in limine to preclude certain evidence. After arguments, the court ruled that the State could present evidence that Megan's hymen was "obliterated" because it was "relevant to the issue as to whether or not sexual intercourse occurred"; but, under the rape shield statute, Trevino was prohibited from bringing in other specific incidences of sexual conduct by Megan that could show an alternative source for the condition of the hymen. Trevino made an offer of proof that Megan had been sexually assaulted on two previous occasions (at ages four and eight) by different perpetrators. The State apparently stipulated that these assaults did occur, and that

the eight-year-old incident "consisted of a 15-year-old boy inserting his finger into her vaginal area for five minutes." Trevino submitted, as part of the offer of proof, an affidavit from a physician who stated that this previous assault could have resulted in the obliteration of Megan's hymen.[1]

In his postconviction motion, Trevino made two arguments: (1) that the trial court erred in excluding the evidence of Megan's previous sexual assaults, thereby violating his constitutional right to present a defense;[2] and (2) that his trial counsel failed to effectively cross-examine Megan, denying his constitutional right to effective assistance of counsel. He renews these arguments on appeal.

PREVIOUS SEXUAL ASSAULT OF MEGAN

Trevino concedes that Wisconsin's rape shield law, § 972.11(2)(b), STATS., prohibits the admission of "any evidence concerning the complaining witness's prior sexual conduct," and that evidence of the prior sexual assaults of Megan are therefore precluded by that statute. However, Trevino argues that § 972.11(2)(b) is unconstitutional as applied in this case in that his Sixth Amendment rights to confrontation and compulsory process were violated when he was not allowed to introduce evidence that Megan's lack of a hymen could be explained by the fact that she was assaulted as a young child.

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[1] This affidavit was not filed with the court until after the postconviction hearing, but the trial court did acknowledge it as an offer of proof.

[2] Trevino did not argue, either prior to trial, in his postconviction motion or on appeal, that the trial court erred in admitting the hymen evidence under § 904.03, STATS., because its probative value was outweighed by the prejudicial effect. We therefore do not consider that issue.

In ***State v. Pulizzano***, 155 Wis.2d 633, 648, 456 N.W.2d 325, 331 (1990), our supreme court recognized that "in some cases a defendant's confrontation and compulsory process rights might require that evidence of a complainant's prior sexual conduct be admitted, notwithstanding the fact that the evidence would otherwise be excluded by the rape shield law." ***Pulizzano*** created a two-part test to assist courts in determining when "the strict application of Wisconsin's rape shield law must at times yield to a defendant's constitutional right to cross-examine witnesses and to present a defense." ***Michael R.B. v. State***, 175 Wis.2d 713, 736, 499 N.W.2d 641, 651 (1993). First, the defendant must make an offer of proof showing: (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. ***Pulizzano***, 155 Wis.2d at 656, 456 N.W.2d at 335. If the defendant makes such a showing, the trial court must then determine whether the State's interests in excluding the evidence are so compelling that they nonetheless overcome the defendant's right to present it. ***Id.*** at 657, 456 N.W.2d at 335. Because this is a question of constitutional law, our review is de novo. ***State v. Dodson***, 219 Wis.2d 65, 69, 580 N.W.2d 181, 185 (1998).[3]

As to the first three factors outlined in ***Pulizzano***, we agree with Trevino that his offer of proof regarding the sexual assault of Megan at age eight made the required showing. First, the prior act clearly occurred, as conceded by

[3] Trevino argues, in the alternative, that his trial counsel was ineffective if he did not make an adequate offer of proof to preserve the ***Pulizzano*** test on appeal. We agree with the State and the trial court that the issue was adequately preserved, *see* ***Michael R. B. v. State***, 175 Wis.2d 713, 736, 499 N.W.2d 641, 651 (1993) (an offer of proof does not need to be stated in complete precision or with unnecessary detail), and we therefore address this issue on the merits.

the State. Second, the prior act closely resembled those charged in that penetration occurred. Third, as the trial court noted, the prior act was clearly relevant to a material issue—"whether or not sexual intercourse occurred." Although it is generally true that evidence of an alleged victim's prior sexual experience is not relevant to whether a separate sexual encounter also occurred, *see* ***Michael R.B.***, 175 Wis.2d at 726, 499 N.W.2d at 646, this evidence is relevant here because it provides an alternative explanation for detrimental physical evidence submitted by the State. *See* ***Dodson***, 219 Wis.2d at 79, 580 N.W.2d at 189.

We agree with the State, however, that Trevino falls short of showing that evidence of the assault on Megan when she was eight years old was necessary to the defendant's case. We reach this conclusion for the following reason. Although the hymen evidence did corroborate the charges of sexual intercourse by Trevino, jurors could also conclude that Megan's hymen was obliterated by other means. The doctor testified that a hymen could be obliterated by repeated masturbation that penetrates the vagina; and, although there was no testimony on the subject, jurors' common sense might reasonably have led them to consider the possibility that Megan's hymen was obliterated by consensual sexual intercourse. Trevino urges us to discount this possibility as the supreme court did in ***Michael R.B.***, 175 Wis.2d at 728, 499 N.W.2d at 647. However, the child victim in that case was eight years old, not fifteen years old as Megan was in this case.

Because we conclude the evidence of the prior sexual assault was not necessary to Trevino's case, we need not discuss the fifth factor or the second prong of the ***Pulizzano*** test. The trial court's decision to prohibit Trevino from

submitting evidence of Megan's prior sexual experiences under the rape shield statute was correct.

INEFFECTIVE ASSISTANCE OF COUNSEL

Trevino also argues that he was denied effective assistance of counsel because his trial counsel did not effectively cross-examine Megan and did not request that opening and closing arguments be recorded. In analyzing an ineffective assistance of counsel claim under the Sixth Amendment, we adhere to the two-part analysis established in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Marty***, 137 Wis.2d 352, 356, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds by* ***State v. Sanchez***, 201 Wis.2d 219, 232, 548 N.W.2d 69, 74 (1996). The first element of the ***Strickland*** test requires the defendant to show that counsel's performance was deficient—that counsel made such serious errors he or she "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). In our analysis, we pay great deference to counsel's professional judgment and make every effort to eliminate the distorting effects of hindsight. ***Id.*** Counsel's performance is not deficient unless the defendant shows that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992). If deficient representation is found, the defendant must show that counsel's deficient performance prejudiced the defense—that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848. If we determine that the defendant has not established one element, we need not address the other. ***Strickland***, 466 U.S. at 697.

At the preliminary hearing, Megan testified that Trevino assaulted her in the morning on Easter Sunday, April 3, 1994. That was the first charge

against Trevino. At trial, however, Megan did not explicitly specify the day of the assault as Easter Sunday and Trevino's trial counsel did not ask Megan the exact date or attempt to impeach her less precise trial testimony with that of the preliminary hearing. Trevino contends this omission greatly diminished the impact of his alibi evidence that Megan spent Easter Sunday with another family in 1994. At the ***Machner*** hearing, Trevino's trial counsel stated that he thought the Easter date had been established at trial because Megan testified that she was watching the Easter Parade at the time. We conclude that this was a reasonable assumption and did not fall below that of a reasonably competent attorney.

Trevino also claims his trial counsel was ineffective for failing to impeach Megan's testimony with prior inconsistent statements from the preliminary hearing regarding the details of the Easter 1994 and November 8, 1995 assaults. Trevino's trial counsel testified that he believed such a cross-examination could have brought before the jury details of an assault even "more repugnant" than she had already testified to and that, given the allegations of repeated assaults over a seven year period, such an attempt at impeaching Megan may have resulted in the district attorney rehabilitating her by highlighting the large number of assaults as an understandable explanation for her confusion on some of the details. We conclude that the strategic decision not to impeach Megan on her prior inconsistent statements from the preliminary hearing was within the range of professionally competent assistance.

Trevino also contends that his trial counsel was ineffective for failing to request that opening statements and closing arguments be recorded. He contends that he was prejudiced by this alleged error because he cannot establish on appeal whether the hymen evidence or the lack of an exact date for the "Easter incident" was emphasized in the State's closing. However, the emphasis of either

in closing argument would not have affected our analysis. Our ***Pulizzano*** analysis was based on the evidence, which does not include argument of counsel. And we have concluded that trial counsel's reason for not attempting to impeach Megan regarding the exact date of the Easter incident was not deficient. Because we conclude that Trevino has not established that this alleged error prejudiced him, we need not consider whether failing to request the recordings was deficient.

By the Court.—Judgment and order affirmed.

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