COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 97-1905-CR
97-1907-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES R. SIEGER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. James Sieger appeals from judgments of conviction for three counts of first-degree sexual assault of a child in violation of § 948.02(1), STATS., two counts of causing a child to expose his or her genitals in violation of § 948.10, STATS., one count of child enticement in violation of §

948.07, STATS., and sixty counts of possession of child pornography in violation of § 948.12, STATS.[1] He also appeals from an order denying his postconviction relief.

Sieger argues he was denied his right to effective assistance of counsel because his trial counsel made two errors that were both deficient and prejudicial: his trial counsel did not object to the jury viewing a videotape in which Sieger appeared in jail clothing and handcuffs, and his trial counsel did not request WIS J I—CRIMINAL 275, a cautionary instruction regarding evidence of other crimes. We conclude that these omissions did not prejudice the outcome of Sieger's trial and we therefore affirm.

BACKGROUND

As a result of alleged acts of sexual contact with two children under the age of thirteen—K.R.A. and her brother K.H.A.—and the discovery of child pornography during a subsequent search of Sieger's home, the State filed charges against Sieger in two separate cases. Case no. 97-1907-CR included charges of sexual assault of a child, causing a child to expose genitals and child enticement, while case no. 97-1905-CR consisted of child pornography charges. After a hearing, the court granted the State's motion to join the two cases because "there's a commonality here that goes to motive, that goes to intent," and it concluded that the trial could be controlled so the defendant would receive a fair trial.

Two occurrences during the four-day consolidated trial are relevant to this appeal. First, the jury viewed a videotaped deposition of K.R.A. in which

[1] These are the convictions that resulted from case nos. 97-1905-CR and 97-1907-CR, which were joined for trial and are consolidated on appeal.

the camera briefly scanned everyone sitting around the table, as the judge stated the appearances before the questioning began. During this scanning, Sieger appeared on screen for no more than five seconds. We have viewed this portion of the videotape. Sieger was wearing a plain orange T-shirt over a long-sleeve white shirt. Although the orange shirt did not have any identifiable lettering on it, it is conceivable that it might have been recognized as part of jail clothing. We also observed a ring of metal encircling Sieger's right wrist. Sieger's right hand was on top of his left hand and he sat very still, so no chains or other metal restraints were visible. Sieger's counsel did not object to the jury's viewing of the videotape.

The second occurrence pertinent to this appeal involves the jury instructions. As a part of the evidence in the child pornography case, the State introduced one hundred sixty-three exhibits including photographs of nude children and magazines with photographs of nude children in arguably sexual poses. With regard to the sexual assault/exposure/enticement case, the jury was not instructed that it could use this pornography evidence only to establish motive or intent; it was not instructed that it could not conclude that Sieger had a certain character trait and acted in conformity with that trait. Sieger's trial counsel did not request such a cautionary instruction.

In case no. 97-1907-CR, Sieger was convicted of three counts of sexual assault, two counts of causing a child to expose his or her genitals and one count of child enticement; and acquitted on one count of child enticement. In case no. 97-1905-CR, the jury returned guilty verdicts on sixty of the sixty-one counts of child pornography. At the postconviction ***Machner*** hearing, Sieger's trial counsel testified that neither of the omissions described above were strategic decisions, but were simply oversights. The trial court ruled that the failure to edit

the videotaped deposition was neither deficient performance or unfairly prejudicial. The trial court did conclude that counsel's failure to request a limiting instruction was deficient, but that Sieger failed to prove that he was prejudiced by the deficient performance. On appeal, Sieger maintains that both omissions by his trial counsel were deficient and prejudicial.

ANALYSIS

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, 687 (1984). *See* ***State v. Marty***, 137 Wis.2d 352, 356, 404 N.W.2d 120, 122 (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). The defendant must also 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." ***Id.*** 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.

For the reasons explained below, we conclude that even if Sieger's trial counsel had edited the videotaped deposition to conceal Sieger's custodial status and had requested the cautionary jury instruction, the result of the proceeding would have been the same. We therefore do not consider whether trial counsel's performance was deficient.

With regard to the videotaped deposition, Sieger relies on ***Estelle v. Williams***, 425 U.S. 501, 503-05 (1976), and argues that jail clothing, handcuffs and shackles are inherently prejudicial to the defendant because they send the jury the impermissible message that the defendant is dangerous and that he has already been deprived of liberty. The Supreme Court was referring to a defendant who appeared before the jury in identifiable prison clothing for his entire trial when it stated:

> [T]he *constant* reminder of the accused's condition implicit in *such distinctive, identifiable attire* may affect a juror's judgment. The defendant's clothing is so likely to be a *continuing influence throughout the trial* that … an unacceptable risk is presented of impermissible factors coming into play.

Id. at 504-05 (emphasis added).

In this case, Sieger's attire was neither readily identifiable as prison clothing or a constant reminder to the jury: The jury saw Sieger for no more than five seconds on a television screen wearing an orange T-shirt and possibly handcuffs.

We find ***State v. Schaller***, 199 Wis.2d 23, 544 N.W.2d 247 (Ct. App. 1995), to be more helpful in analyzing the facts in the current case. In ***Schaller***, several jurors viewed a television broadcast in which the defendant appeared for about ten or fifteen seconds in a jail uniform, and for about two seconds of that broadcast the defendant's leg shackles were visible. Although ***Schaller*** involved claims of juror misconduct rather than ineffective assistance of counsel, we stated in that case that "the real issue is whether the information—the video played on the newscast—was prejudicial," and we concluded that it was not. ***Id.*** at 46, 544 N.W.2d at 257. We did not "see any reasonable probability that

those few seconds of videotape coverage would have prejudiced an average jury hearing [a] four day trial." ***Id.*** at 47, 544 N.W.2d at 257. We reach the same conclusion in this case.

Sieger also contends that his trial counsel was ineffective for failing to request a cautionary jury instruction, WIS J I—CRIMINAL 275.[2] This instruction, Sieger contends, would have prevented the jury from considering the one hundred sixty-three pornography exhibits for purposes other than establishing motive or intent, such as creating a generally prejudicial view of Sieger from the philosophy portrayed by the exhibits. We are not persuaded by this argument.

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[2] WIS J I—CRIMINAL 275 provides:

> Evidence has been received regarding other (crimes committed by) … the defendant for which the defendant is not on trial.
>
> Specifically, evidence has been received that the defendant (describe act). If you find that this conduct did occur, you should consider it only on the issue(s) of … (motive) … [and] (intent).
>
> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case. The evidence was received on the issue(s) of …
>
> [motive, that is, whether the defendant has a reason to desire the result of the crime.]
>
> ….
>
> [intent, that is, whether the defendant acted with the state of mind that is required for this offense.]
>
> ….
>
> You may consider this evidence only for the purpose(s) I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

Sieger admitted the acts involved in the sexual assault/exposure/enticement case. The disputed issue for the jury to resolve in that case was whether Sieger had a sexual purpose. The jury instruction Sieger proposes would have explicitly allowed considering the pornography exhibits to establish such motive or intent. Although the exhibits may very well have aided the jury in reaching guilty verdicts on the sexual assault, exposure and enticement charges, WIS J I—CRIMINAL 275 would not have prevented the jury's appropriate consideration of the pornography exhibits on the issue of sexual purpose.

We are not convinced that there is a significant danger in this case that the jury considered the exhibits for improper purposes, thereby unfairly prejudicing Sieger. With regard to the pornography counts, the trial court did instruct the jury:

> Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

The court also instructed the jury, generally:

> You will not be swayed by sympathy, prejudice, or passion. You will be very careful and deliberate in weighing the evidence.

These instructions, coupled with the fact that the jury returned a verdict of not guilty on one count of child enticement in one case and one count of child pornography in the other case, convinces us that the jury considered the evidence on each count and did not simply convict Sieger because of a negative character trait portrayed by the pornography exhibits.

We therefore conclude that Sieger's trial counsel's allegedly deficient omissions did not prejudice the outcome of the trial, and we affirm.

By the Court.—Judgments and order affirmed.

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