COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1648-CR **Cir. Ct. No. 2013CF50**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NIKIA SHANTAY BURCHETTE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Nikia Burchette appeals judgments convicting her of two offenses and an order denying postconviction relief. Burchette argues her trial attorney was ineffective in three ways. She also argues the circuit court

erroneously exercised its discretion by admitting other acts evidence. We reject Burchette's arguments and affirm.

BACKGROUND

¶2 Burchette was charged with four counts, each as a party to a crime: (1) trafficking of a child; (2) human trafficking; (3) physical abuse of a child—intentionally causing bodily harm; and (4) operating a motor vehicle without the owner's consent. Counts 1 and 2 were based on allegations that Burchette brought a fourteen-year-old girl to Iron County to engage in a commercial sex act. Count 3 was based on an allegation that, after becoming angry with the girl, Burchette "struck her and pushed her down." Count 4 was based on an allegation that the vehicle Burchette drove to Iron County had been reported stolen from a car dealership.

¶3 Before trial, the State filed a motion in limine to introduce other acts evidence that, during the two weeks before the charged offenses, Burchette had arranged for the victim to perform commercial sex acts in cities outside Iron County. The State argued this evidence was admissible to show motive, opportunity, planning, preparation, and intent because the prior acts arose out of the same continuing course of criminal conduct as the charged offenses. The circuit court granted the State's motion, allowing it to introduce the other acts evidence "to establish a nexus in terms of human trafficking … and to that limited extent only."

¶4 A two-day trial was held in January 2014. On the first day of trial, the prospective jurors were sworn at 9:54 a.m., before Burchette was present in the courtroom. Immediately thereafter, the circuit court stated, in the jury's presence, "Have the defendant brought over." The court then inquired of the prosecutor,

still in the jury's presence, "[A]re you having the defendant brought over?" After the prosecutor answered in the affirmative, the court stated, "Please call the panel." At that point, the clerk asked, "Do you want me to wait for her?" and the court replied, "No." The prospective jury panel was then called forward. After an off-the-record discussion at the bench between the court and the attorneys, the court informed the panel, "Just so everyone knows what's taking place, we're waiting for the defendant to arrive, and when she arrives, we'll begin the process." Burchette was escorted into the courtroom at about 10:08 a.m., wearing orange jail garb.

¶5 After the jury was selected and sworn, the parties gave their opening statements. A lunch recess was then taken. During the recess, Burchette was allowed to change into civilian clothing her family had brought for her. She wore civilian clothing for the remainder of the trial.

¶6 Following the lunch break, the State's first witness testified he was in the parking lot of his business in Mercer at about 6:00 a.m. on September 27, 2013, when the victim sprinted up to him, barefoot. When she reached the witness she said, "[S]ir, please help me. I am afraid. There's people going to hurt me." The victim, whom the witness described as "crying" and "hysterical," asked the witness to "please, get [her] out of here." The witness testified the victim had a small amount of blood in one eye, and "her face was puffy, looked like she'd been either slapped around or in contact with something."

¶7 As the witness was speaking to the victim, he noticed a "black person" running toward them. When the victim saw that individual, she became "even more hysterical" and again asked the witness to "get [her] out of here." The witness then drove away with the victim and called 911 from his vehicle. He

arranged with dispatch to meet an ambulance at a nearby park. On the way there, the victim told the witness "that she had been involved in prostitution, … that she was afraid for her life," and that "these people" were going to hurt her and her family.

¶8 The victim testified she was fourteen years old on September 27, 2013, and was in the ninth grade. On September 11 or 12, 2013, she had run away from home. Five or six days later, she and a friend met a man called "Tone" while looking for someone from whom they could buy marijuana. They ended up staying the night at Tone's house in Milwaukee, and the next morning "there were a few other girls in the house," including Burchette. Burchette approached the victim, gave her a hug, and said, "I've been waiting to see you all my life."

¶9 Later that day, the victim agreed to go to Madison with Tone, Burchette, and some other girls. Once in Madison, the group rented a hotel room, and the victim "did some calls" or "tricks"—that is, had sexual relations with men in exchange for money.[1] The victim testified Burchette helped her to arrange these "tricks" using "Back Page," which the victim stated is a website prostitutes use to advertise their services. The victim described four separate tricks that occurred while she was in Madison. The money she earned from those tricks was given to Burchette or Tone and was pooled with money earned by other girls in the group.

¶10 The victim also testified that, while in Madison, pictures were taken of her for use in Back Page advertisements. The pictures, which were introduced

[1] The victim conceded on cross-examination that she had engaged in prostitution before going to Madison with Tone and Burchette in September 2013.

into evidence at trial, showed the victim posing with another female while wearing only undergarments. The victim testified Burchette set up the poses for the pictures and instructed her to "do something sexy."

¶11 At some point, the group returned to Milwaukee from Madison. After that, the victim remembered "picking up a call in Eau Claire" and doing some calls south of Milwaukee. After one of those calls, the victim was "stranded" at a hotel near an airport and could not reach Burchette. She was upset because she thought Burchette had taken the money from the call and abandoned her. Following that experience, the victim told Burchette she was "not going to come back." However, Burchette "ke[pt] trying to get [the victim] back," and the victim eventually agreed to see Burchette again.

¶12 When Burchette picked the victim up for that meeting, "everything got serious." The victim described the meeting as "an intimidating situation." When the victim tried to get out of the car, Burchette "pulled [her] hair and said, you're not going anywhere." The victim repeatedly asked to leave, and Burchette "said if you try to get out of this car, I'll run you over." Burchette eventually calmed down and told the victim she could leave. The victim "ended up back with" Burchette. On cross-examination, the victim conceded she "wasn't afraid of" Burchette.

¶13 One or two days later, the victim, Burchette, and two other girls travelled to Mercer. The victim testified she had received a phone call from a man named Dennis in response to an advertisement Burchette had placed on Back Page. With Burchette's help, the victim convinced Dennis to pay her $300 in expenses so that she could travel from Milwaukee to Mercer to meet him. He also agreed to pay her either $1,500 or $1,000 to spend the night at his home. The

victim testified Dennis told her, "I'm going to love you all night long," which she understood as referring to sex.

¶14 When the group arrived at Dennis's home in the Mercer area, Dennis gave the victim $1,200, which she counted and then handed to the girls in the car. Dennis asked if they could have sex, and the victim responded, "[Y]es, as many times as you want." However, after the other girls left, the victim began feeling sick. She and Dennis kissed and took a bath together, but they did not have sex. They eventually went to sleep, and Burchette and one of the other girls picked the victim up early the next morning. They drove to the Loon's Nest Motel in Mercer, where Burchette and the other girls had rented a room. The victim could tell Burchette had been drinking.

¶15 After they arrived at the motel room, the victim lay down on one of the beds with the other two girls. Burchette then became angry because the victim had lain down with the other girls instead of lying down with her. Burchette yelled at the victim, slapped her face, and pulled her hair.[2] She threatened to kill the victim and her family. At some point, Burchette went into the bathroom, and the victim grabbed some money and ran barefoot from the motel room. She testified she did not consent to being beaten by Burchette, but she did consent to engaging in prostitution.

¶16 The jury ultimately found Burchette guilty on Counts 1 and 3 (child trafficking and child abuse—intentionally causing bodily harm), but not guilty on

[2] Photographs of the victim's injuries were introduced into evidence at trial.

Count 2 (human trafficking).[3] Burchette moved for postconviction relief, asserting ineffective assistance of trial counsel. The circuit court denied that motion, following a ***Machner***[4] hearing. This appeal follows.

DISCUSSION

I. Ineffective assistance

¶17 Burchette renews her ineffective assistance arguments on appeal. To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show 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. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶18 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court's findings of fact unless

[3] Count 4 (operating a motor vehicle without the owner's consent) was dismissed on the State's motion on the morning of the second day of trial.

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

they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

A. Failure to object to Burchette's appearance at trial in jail garb

¶19 Burchette first argues her trial attorney was ineffective by failing to object to her appearance at trial in jail garb or to "otherwise preserve [her] right to appear at her jury trial in plain clothing." The United States Supreme Court has explained that a defendant's appearance at trial in jail attire "may affect a juror's judgment" and presents "an unacceptable risk … of impermissible factors coming into play." ***Estelle v. Williams***, 425 U.S. 501, 504-05 (1976). Consequently, "a state violates a defendant's right to due process, and therefore the presumption of innocence, when it requires him [or her] to appear at trial in identifiable prison clothing." ***State v. Clifton***, 150 Wis. 2d 673, 679, 443 N.W.2d 26 (Ct. App. 1989) (emphasis omitted). Here, Burchette notes that, in addition to appearing at trial in jail garb, she was escorted into the courtroom by sheriff's deputies, and the circuit court made two comments to the prosecutor in the jury's presence about having her "brought over." Based on these factors, Burchette argues she was "clearly presented to the jury as being in custody."

¶20 At the ***Machner*** hearing, trial counsel testified he knew Burchette had the right to appear at her trial wearing civilian clothing, and he made arrangements prior to trial for Burchette's mother to bring civilian clothes for her to wear. Counsel was therefore "completely" surprised when Burchette came into trial wearing jail clothing. He later learned Burchette's family had been delayed getting to Iron County that morning. He testified he considered requesting an adjournment, but he

> anticipated there was an overwhelming chance that any such motion would be denied … by the Court because of the large number of jurors, the … desire to get the trial started because it was going to be a multi-day trial, and there would be no time to fool around with such matters as whether or not the defendant was appropriately dressed.

When asked whether he considered raising the issue at a side bar outside the jury's presence, counsel responded:

> I did. And the problem was it was … my responsibility. I'm sure the Court would have … assigned responsibility for her appropriate dress to me, not to the District Attorney, not the sheriff. It's really the Defense Attorney's job to insure that … the client's appropriately dressed.
>
> So—and I anticipated—I've been with … this Court, for some 15 years, probably done well over two dozen jury trials. Uhm, I knew that that request would be denied because the finger would be—could be pointed squarely at me for not making sure she was in appropriate attire. So, I made those preparations, but they fell through.

Counsel conceded Burchette voiced a concern to him during trial about her attire, but he told her "we just have to go with what we have right now."

¶21 We conclude Burchette's attorney did not perform deficiently with respect to her attire at trial. Counsel was aware Burchette had a constitutional right to appear at trial in civilian clothes, and he took reasonable steps to ensure such clothes would be available. Unfortunately, those measures failed due to circumstances outside his control—namely, Burchette's family's late arrival at the courthouse. Counsel testified he was "completely" surprised when Burchette was brought into the courtroom in jail garb. He considered requesting an adjournment or raising the issue at a sidebar outside the jury's presence, but, based on his experience before the circuit court, he determined those requests would be denied. Counsel's strategic decision not to object to Burchette's appearance in jail garb was reasonable in light of his experience, and also in light of the fact that an

objection may have called the jury's attention to the issue. Counsel's strategic choices, made after a thorough investigation of the law and facts, are virtually unchallengeable on appeal. *See* ***Strickland***, 466 U.S. at 690.

¶22 Moreover, even if counsel performed deficiently by failing to object to Burchette's appearance at trial in jail garb or by failing to otherwise preserve her right to appear in civilian clothing, we would nevertheless conclude for two reasons that Burchette has failed to demonstrate she was prejudiced by the alleged deficiency. First, Burchette appeared in jail garb only during the morning of the first day of trial. She was dressed in civilian attire during the remainder of the two-day trial, including the entire evidentiary portion of the proceedings. Burchette asserts the change into civilian clothes may have drawn the jury's attention to the fact that she had previously been wearing jail attire. However, that assertion is purely speculative. It is just as likely that any prejudice created by her initial appearance in jail garb was diminished by her subsequent change into civilian clothes.

¶23 Second, and more importantly, while the jury convicted Burchette of child trafficking and child abuse, it acquitted her of human trafficking. If the jury had actually failed to give Burchette the presumption of innocence due to her appearance in jail garb on the first day of trial, it likely would have convicted her of all the charges, rather than acquitting her of one. A defendant's acquittal on one or more of the charged counts is strong evidence that the jury "was not so prejudiced by the improper information that it controlled their deliberative process." *See* ***State v. Marcum***, 166 Wis. 2d 908, 926, 480 N.W.2d 545 (Ct. App. 1992).

¶24 Burchette argues the State's case on the human trafficking count was "far weaker" than on the other counts, and the State failed to "meet its burden o[n] the key element of human trafficking, the use or threat of force." She therefore argues, "The fact that the jury acquitted Burchette[] on a charge for which the State failed to prove the necessary evidence does not erase the prejudice on the remaining charges." We disagree. The fact that the jury acquitted Burchette of the charge on which the State's proof was arguably weakest, but convicted her of the charges on which the State presented stronger evidence, actually shows the jury appropriately weighed the evidence and strongly suggests its deliberative process was not affected by Burchette's initial appearance at trial in jail garb. Consequently, it is not reasonably probable the result of Burchette's trial would have been different had counsel objected to her appearance in jail attire, and Burchette has therefore failed to demonstrate prejudice.

B. Failure to request a cautionary instruction regarding other acts evidence

¶25 Burchette next argues her trial attorney was ineffective by failing to request a cautionary instruction regarding the other acts evidence that was admitted at trial. Our supreme court has recognized that cautionary instructions "are preferred and should normally be provided when admitting other acts evidence." ***State v. Payano***, 2009 WI 86, ¶100, 320 Wis. 2d 348, 768 N.W.2d 832. The pattern cautionary instruction regarding other acts evidence explains the limited purposes for which that evidence may be considered and admonishes jurors that they may not "consider [the] 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." WIS JI—CRIMINAL 275 (2003). A circuit court is required to give a

cautionary instruction on other acts evidence if requested by one of the parties. *See* WIS. STAT. § 901.06.[5]

¶26 At the ***Machner*** hearing, Burchette's trial attorney conceded he had no strategic purpose in failing to request a cautionary instruction. He described his failure to do so as an "oversight," explaining, "[Y]ou have to trust your instincts, and sometimes in this particular case my instincts failed me."

¶27 Again, we conclude that, even if Burchette's trial attorney performed deficiently by failing to request a cautionary instruction, Burchette has failed to demonstrate she was prejudiced by the alleged deficiency. The other acts evidence admitted at trial pertained to multiple instances in which Burchette arranged for the victim to engage in commercial sex acts outside Iron County. The other acts evidence also pertained to an incident in which, after the victim indicated she did not want to work with Burchette anymore, Burchette pulled her hair and threatened her. Burchette concedes this evidence was relevant to show motive, opportunity, planning, preparation, and intent. As the circuit court recognized, the other acts evidence was particularly relevant to the human trafficking charge, which required the State to prove that Burchette, as a party to the crime, knowingly provided the victim for the purpose of labor or services by causing or threatening to cause bodily harm to any individual. *See* WIS. STAT. § 940.302; WIS JI—CRIMINAL 1276 (2015).

¶28 Despite the admission of the other acts evidence—and the lack of a cautionary instruction—the jury acquitted Burchette of the human trafficking

[5] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

charge. If the jurors had been prejudiced by the other acts evidence, such that they were inclined to convict Burchette of the charged crimes simply because they thought she was a bad person who was likely to commit those crimes, they likely would have convicted her of all three charges. Instead, the jury acquitted Burchette of the human trafficking charge—the charge to which the other acts evidence was most relevant. That fact convinces us it is not reasonably probable the result of Burchette's trial would have been different had trial counsel requested a cautionary instruction. Accordingly, Burchette was not prejudiced by counsel's failure to do so.

C. Failure to object during the State's closing argument

¶29 Burchette's third ineffective assistance claim is that her attorney performed deficiently by failing to object during the State's closing argument. Burchette contends the State improperly argued that the victim "is a petite, white girl, clearly is going to be in high demand on the prostitutional [sic] website." Burchette also cites the State's assertion that "everybody put security on their computers to get away from things like Back Page." Burchette argues no evidence was offered at trial to support either of these contentions.

¶30 Burchette also quotes a 161-line passage from the State's closing argument, asserting it is "the most prejudicial and improper part of the State's argument." She complains that, in this passage, the State "encouraged the jury to focus on the potential, *speculative* horrors of the sexual acts [the victim] may have encountered *outside* Iron County." She further asserts:

> The State's argument encouraged the jury to focus on the negative impact the alleged crime *may* have had on [the victim] and her future. It does not reflect evidence that was admitted at trial. No evidence was offered about the quality or decency of men [the victim] encountered. No

> evidence was offered about [the victim's] future drug-dependency or counseling needs. Those arguments were not offered for a legal or permissible purpose. They were made to sway the jury by passion and prejudice.

Burchette therefore contends her trial attorney should have objected "at some point" during the State's closing argument.

¶31 Burchette's argument on this topic is underdeveloped. An assertion that trial counsel should have objected "at some point" during the State's closing argument is insufficient to demonstrate counsel performed deficiently by failing to object. If Burchette cannot, even with the benefit of hindsight, identify at what point during the State's closing argument an objection should have been made, she cannot fault her trial attorney for failing to do so.

¶32 More importantly, the record demonstrates that trial counsel had a valid strategic reason for not objecting to the State's comments. At the ***Machner*** hearing, counsel testified he had been practicing before the judge who presided over Burchette's trial for fifteen years, and he knew that judge was "very liberal" with respect to closing arguments, allowed "both sides considerable freedom," and "lean[ed] toward" allowing "almost everything that's even remotely related." Counsel stated that, in previous trials, he had objected to what he believed were improper closing arguments by the State, and his objections were "almost invariably" denied. Based on that experience, counsel explained:

> I had to make a tactical decision. Do I object continuously with the probability from past experience with this Court that my objections would be … overruled and curry disfavor with the jury, or do I just keep my mouth shut and hope that the jury will get tired and bored with the Prosecution's constant hammering over and over again …?
>
> I sneak a peek at the jury, as I'm sure all trial lawyers do, and when I see them with their eyes closed or staring off into space, then I know the argument is falling on deaf ears.

> So I did see that. So I thought, rather than object vociferously, vehemently or repeatedly and run the risk of being overruled repeatedly, I was hoping that the effect of the Prosecution's argument would turn the jury off, … would not be impressive to the jury.

¶33 Counsel further explained he believed having an objection overruled would have "reinforce[d] whatever argument the Prosecution was making." The circuit court confirmed in its oral ruling denying Burchette's postconviction motion that it would have overruled any objection to the State's closing argument. On these facts, we cannot conclude trial counsel's strategic decision not to object during the State's closing argument constituted deficient performance. *See* ***Strickland***, 466 U.S. at 690 (counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable).

D. Cumulative prejudice

¶34 Burchette also argues she was prejudiced by the cumulative effect of counsel's alleged deficiencies. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 395 ("[P]rejudice should be assessed based on the cumulative effect of counsel's deficiencies."). We disagree. We have already determined Burchette's trial counsel did not perform deficiently by failing to object to Burchette's initial appearance in jail garb or by failing to object during the State's closing argument. Accordingly, we need not consider those alleged errors in our cumulative prejudice analysis. *See* ***id.***, ¶61 ("[E]ach alleged error [by trial counsel] must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness—in order to be included in the calculus for [cumulative] prejudice."). We have also concluded Burchette was not prejudiced by the only other alleged deficiency—counsel's failure to request a cautionary

instruction regarding other acts evidence. We therefore reject Burchette's cumulative prejudice argument.

II. Other acts evidence

¶35 Finally, Burchette argues the circuit court erred by admitting other acts evidence regarding events that occurred outside Iron County. She specifically cites the victim's testimony that Burchette "assisted her in setting up and attending four tricks in Madison, one in Eau Claire and 'more' in Milwaukee" and "helped to take seductive photographs of her and helped her place Back Page advertisements."

¶36 We review a circuit court's admission of other acts evidence for an erroneous exercise of discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrably rational process to reach a conclusion a reasonable judge could reach. ***Id.*** at 780-81.

¶37 Wisconsin courts apply a three-step test to determine the admissibility of other acts evidence, considering: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2); (2) whether the evidence is relevant under WIS. STAT. § 904.01; and (3) whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion, undue delay, or needless presentation of cumulative evidence under WIS. STAT. § 904.03. ***Sullivan***, 216 Wis. 2d at 772-73. Here, Burchette concedes the other acts evidence admitted at her trial was offered for a permissible purpose and was relevant. Her only argument against admissibility is that the evidence's probative value was outweighed by the danger of unfair prejudice.

¶38 Although the circuit court did not expressly address the third step of the ***Sullivan*** analysis, upon our independent review of the record, we conclude the danger of unfair prejudice did not outweigh the probative value of the other acts evidence admitted at Burchette's trial. *See* ***id.*** at 781 ("When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion."). Nearly all relevant evidence is prejudicial. *See* ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994). Evidence is not *unfairly* prejudicial simply because it harms the opposing party's case. ***Id.*** Rather, unfair prejudice results

> when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90.

¶39 Burchette argues the other acts evidence introduced at her trial was unfairly prejudicial because it "arous[ed] the jury's sympathies and … sense of horror." However, Burchette ignores the fact that the evidence was highly relevant to the permissible purposes for which it was admitted—namely, to demonstrate Burchette's planning, preparation, motive, or intent. She also ignores the fact that, despite the admission of the other acts evidence, the jury acquitted her of the charge to which that evidence was most relevant—human trafficking. On this record, we cannot conclude the probative value of the other acts evidence was outweighed by the danger of unfair prejudice. We therefore reject Burchette's argument that the circuit court erred by admitting the other acts evidence.

By the Court.—Judgments and order affirmed.

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