COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP632 **Cir. Ct. No. 2001CF8**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FLOYD HIPSHER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Bayfield County: ROBERT E. EATON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Floyd Hipsher appeals an order denying his WIS. STAT. § 974.06 (2003-04) postconviction motion in which he argued that the prosecutor in his sexual assault trial impermissibly presented evidence that Hipsher invoked his right to remain silent, and his trial attorney was ineffective for

failing to object to the impermissible questions. Because we conclude that the error, if any, was harmless beyond a reasonable doubt, and Hipsher failed to establish any prejudice from his counsel's performance, we affirm the order.

¶2 A jury convicted Hipsher of repeatedly sexually assaulting his stepdaughter. In addition to the victim's testimony, the State presented evidence from the victim's sister that Hipsher slid a mirror under the bathroom door while the sister was in the shower and that he touched her vagina and breasts through her clothes while he was riding with her on an all-terrain vehicle. He also inappropriately touched her while giving her backrubs. The children's mother testified that she saw Hipsher peeking in the girls' bedroom while they were preparing for bed. Hipsher did not testify. He presented his defense through a police investigator who interviewed Hipsher about these allegations. Hipsher denied inappropriately touching his stepdaughters and offered an explanation for their false allegations. The prosecutor's cross-examination of the officer consisted of only two questions:

> Q. During your course of questioning of the defendant, at some juncture did he terminate the interview?
>
> A. Yes.
>
> Q. And were you concluded with your interview at that juncture or was it your desire to continue it?
>
> A. I wished to continue speaking with him.

Hipsher contends these questions constituted impermissible use of his silence under ***Doyle v. Ohio***, 426 U.S. 610, 619 (1976), after he was given his ***Miranda***[1] warnings.

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶3 We need not determine whether the prosecutor's questions violated the rule set out in ***Doyle*** because the error, if any, was harmless beyond a reasonable doubt. *See* ***Hannemann v. Boyson***, 2005 WI 94, ¶57, 282 Wis. 2d 664, 698 N.W.2d 714. The two questions and answers were diminimis in the context of the two-day jury trial. The prosecutor did not mention Hipsher's termination of the interview in his closing argument. As the trial court noted at the postconviction hearing, this case was decided on the demeanor of the complaining witness and the other testimony presented by the State. It was not decided on the basis of who terminated the police interview. In the context of the entire trial, any damage done to the defense by these questions could only be minimal.

¶4 Because Hipsher was not prejudiced by these questions, he was also not prejudiced by his counsel's failure to object to the questions. To establish ineffective assistance of counsel, Hipsher must show a reasonable probability that counsel's unprofessional errors affected the result of the trial. A reasonable probability is one that undermines this court's confidence in the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). The unchallenged presentation of this testimony does not undermine our confidence in the outcome.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).