COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP1390-CR
2004AP3354-CR

Cir. Ct. No. 1995CF954596

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN J. MCKILLION

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Kevin J. McKillion appeals the judgment, entered following a jury trial, convicting him of first-degree sexual assault of a child,

contrary to WIS. STAT. § 948.02(1) (1993-94).[1] He also appeals from the orders denying his postconviction motions.[2] McKillion argues that the trial court erred in not granting his motions seeking a new trial. He claims a new trial is required because the trial court erroneously exercised its discretion when it admitted evidence of an earlier uncharged sexual assault of the victim, and his trial attorney was ineffective for failing to object to the testimony of two witnesses. Finally, he submits that because he presented newly-discovered evidence consisting of the victim's recantation, the trial court should have granted his motion seeking a new trial. Because the other acts evidence was admissible, his attorney was not ineffective and there was no actual recantation, we affirm his conviction.

I. BACKGROUND.

¶2 In 1995, McKillion was charged with one count of first-degree sexual assault of a child. The criminal complaint stated that on October 18, 1995, McKillion placed his finger in the vagina of N.M., then eight years old. Shortly before trial, the State brought a motion to admit other acts evidence consisting of N.M.'s claim that McKillion sexually assaulted her in a similar manner approximately one year earlier. The trial court granted the State's motion over McKillion's objection. A three-day jury trial was held.

¶3 During the trial, the State called several witnesses, including N.M. N.M. related to the jury the details of both assaults, including McKillion telling

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] On December 27, 2004, these cases were consolidated for briefing and dispositional purposes.

her after the first assault that she should not tell anyone because they both would get in trouble. One of the other witnesses was a registered nurse who examined N.M. after the police were notified. The nurse testified that what she observed in her vaginal examination of N.M. was consistent with N.M.'s complaint of sexual assault, and when asked by McKillion's attorney, she stated she could not think of any other possible way that the injury could have occurred. The father of N.M. also testified. He related to the jury that because he could tell instantly if his children lied to him, he was able to tell that his daughter was lying when she said nothing had happened to her when he questioned her shortly after the second assault took place. No objection was raised to either witness's testimony. The trial culminated in the jury finding McKillion guilty. The trial court subsequently sentenced him to twenty years in prison.

¶4 Although a notice of intent to seek postconviction relief was filed on McKillion's behalf, his attorney failed to file either a motion or an appeal. As a result, this court reinstated his appellate rights. In October 2003, a motion seeking a new trial based upon newly-discovered evidence was filed in the trial court. The new evidence consisted of a claim that N.M. signed a notarized statement on April 2, 1999, in which she stated that she testified falsely at trial about the sexual assault and that the sexual assault never happened. An evidentiary hearing was held on December 29, 2003, after which the motion was denied. An appeal was filed. In October 2004, McKillion filed a postconviction motion seeking a new trial pursuant to WIS. STAT. § 809.30. This motion was also denied and an appeal was filed.

II. ANALYSIS.

A. The trial court properly exercised its discretion when it admitted the other acts evidence.

¶5 McKillion argues that the trial court should not have allowed the State to elicit testimony from N.M. that McKillion sexually assaulted her approximately one year before the incident for which he was charged. McKillion contends that: (1) the evidence did not fall within a permissible purpose under WIS. STAT. § 904.04(2); (2) the trial court failed to "weigh the minimal probative value of the evidence versus the large danger of unfair prejudice"; and (3) the reason given by the State for admitting this evidence, that it explained why N.M. was reluctant to tell her father about the second assault, because McKillion had warned her that if she told anyone they would both get in trouble, was not supported by the evidence at trial.[3] We disagree.

¶6 The trial court's determination "to admit or exclude evidence is a discretionary decision that will not be upset on appeal" absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). Accordingly, we will sustain an evidentiary ruling if "the trial court examined the relevant facts, applied a proper standard of law, and … reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

[3] McKillion also argues that the time frame was too vague, citing ***State v. R.A.R.***, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988), for support. However, ***R.A.R.*** is inapposite because there, the defendant was actually charged with the assault, and the issue dealt with the sufficiency of the complaint. ***Id.*** at 409. Here, no charge was issued for McKillion's earlier assault, and thus, N.M.'s inability to pinpoint the exact date was not crucial.

¶7 Other acts evidence is permitted under certain circumstances as set forth in WIS. STAT. § 904.04(2):

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶8 Admissibility of other acts evidence is governed by a three-step test: the evidence must be admitted for an acceptable purpose under WIS. STAT. § 904.04(2); it must be relevant; and its probative value must not be substantially outweighed by the danger of unfair prejudice. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Greater latitude applies to all three questions when reviewing other acts evidence in sexual assault cases, especially in cases involving children. ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606.

¶9 Here, after listening to argument from both sides at a pretrial hearing, the trial court acknowledged that additional defense witnesses might have been required if the evidence was admitted, but the trial court stated that the evidence was relevant, not unfairly prejudicial, and admitted for a permissible purpose. The trial court reasoned:

> Well, it may create the need for additional witnesses on your part. I don't think it unnecessarily complicates the trial or risks confusing the jury. It seems to me it's highly relevant on the issues noted by [the prosecutor] in this case and while it is prejudicial to the defendant, I don't believe that the prejudicial effect outweighs the probative value of the evidence and in addition it is offered for a permissible purpose under the statute and case law cited by the prosecutor and so I will permit[] its introduction as other crimes, wrongs or acts evidence.

In its remarks, the trial court referenced the State's argument. The prosecutor had earlier argued that the other acts evidence was admissible, stating:

> [THE PROSECUTOR]: I'm offering it under 904.04(2) to demonstrate the context in which ultimately the disclosure was made. Specifically under State v. Shillcutt, … which is at 116 Wis. 2d 325, there is a description and a discussion about the use of prior acts when they are not [sic] to flesh out the context such that the jury can understand what happened and why people made certain decisions and I think that this is the classic example of that. I think that the circumstances in Shillcutt are almost directly on point to the circumstances in this particular case.
>
> ….
>
> In addition to what I perceive to be the defense in this case, which is that this child is lying and that somebody has put her up to doing this, I think that this evidence is absolutely crucial and is not so prejudicial to the defendant that it ought to be excluded for the reason that it's going to come in through the victim as well as for the fact that the primary thrust of this is that she will be talking about why she didn't tell anybody about it and why she was reluctant to talk about it when she was confronted by her father.

Clearly, the trial court adopted the prosecutor's argument as its own analysis. Thus, the trial court admitted the evidence for a proper purpose because "[o]ther-acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case." ***State v. Hunt***, 2003 WI 81, ¶58, 263 Wis. 2d 1, 666 N.W.2d 771. The fact that N.M. had been sexually assaulted earlier in an identical manner by McKillion was relevant evidence in determining whether McKillion sexually assaulted her in October 1994, and, as the trial court noted, while the evidence was prejudicial in the sense that it did not favor McKillion, the prejudicial effect did not substantially outweigh the evidence's probative value. Further, given the greater latitude afforded other acts evidence in sexual assault

cases involving children, we are satisfied that the trial court properly exercised its discretion in admitting this evidence.

¶10 Finally, McKillion's argument that N.M.'s actual testimony did not support the underlying reason given for the introduction of the other acts evidence is partly correct. As anticipated, N.M. did testify that McKillion told her that they would both get in trouble if she told anyone about the earlier assault. However, when asked whether she thought that was a likely outcome, N.M. stated that she thought McKillion would get in trouble, but she would not. She also stated she did not tell her parents "because they were not home," and she did not tell them later "because they were mad at each other." As a result, McKillion is correct in asserting that what prevented N.M. from revealing the assault was not his threat to her, but rather, her belief that he would get in trouble and her parents' apparently stormy relationship. While not entirely within the facts stated by the prosecutor in arguing for the admission of other acts evidence, the other acts did explain the dynamics present in the household and N.M.'s reluctance to reveal the attack, both permissible reasons for admitting the evidence.

B. McKillion's attorney was not ineffective.

¶11 McKillion next argues that his attorney was ineffective because he failed to object to inadmissible evidence consisting of: (1) the examining nurse, who volunteered, when asked, that she could not think of any other reason for N.M.'s vaginal injuries except a sexual assault; and (2) N.M.'s father's testimony that he could tell when his children were lying, and in doing so, N.M.'s father testified as to N.M.'s truthfulness. We disagree.

¶12 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was

prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient, and, as a result, the defendant suffered prejudice. *See* ***Strickland***, 466 U.S. at 690. To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume[]" counsel has rendered adequate assistance. ***Id.*** at 690.

¶13 McKillion claims that the nurse's testimony here exceeded the scope of the testimony of a nurse approved in ***State v. Ross***, 203 Wis. 2d 66, 552 N.W.2d 428 (Ct. App. 1996). There, this court concluded that the nurse's opinion was admissible when she testified that the injuries of a sexual assault victim that she observed were consistent with having been penetrated vaginally. ***Id.*** at 79-82. McKillion submits that the nurse here went well beyond the admissible testimony permitted in ***Ross*** and basically told the jury that the victim had been sexually assaulted. Additionally, he complains that the nurse should not have been able to give any opinions about the possible source of the injury because she testified she had no experience in conducting vaginal examinations of patients who had not claimed to have been sexually assaulted. We disagree with both contentions.

¶14 The nurse was asked the following questions on cross-examination:

> Q. Now, you did indicate that whether you described the redness in various parts of the genital area that this was consistent with finger penetration?
>
> A. Yes.
>
> Q. Is it also consistent with any other non-sexually assault related conditions?
>
> A. Not in my opinion. It did not appear to me that she had an infection. It did not appear to me that she had a rash of any kind or anything that would indicate that the redness was due to anything other than being touched in the way that she described.
>
> Q. Is that based on what you saw or what you were told by [N.M.]?
>
> A. That is based on what I saw.

¶15 First, we note the complained of questions and answers were elicited by McKillion's attorney, not by the prosecutor. Moreover, by answering the questions in the manner that she did, the nurse did not violate the holding in ***Ross***. She stated that she did not believe the injuries were consistent with any other non-sexual assault-related conditions. This is not the same as saying that the injuries could only have been caused by a sexual assault. Finally, McKillion's complaint that the nurse was not qualified to give an opinion because she had only been involved in examining women who claimed to have been sexually assaulted lacks merit. The nurse was found to be an expert and she was subjected to vigorous cross-examination. It was up to the jury to evaluate her testimony and determine whether her opinion should be given any credence. Here, the jury presumably found the nurse's testimony credible. Thus, McKillion's attorney was not ineffective for failing to object to the nurse's testimony.

¶16 Next, McKillion claims that this attorney was ineffective for failing to object to N.M.'s father's testimony concerning his ability to know when his

children are lying. He posits that the father's testimony was the equivalent of vouching for the truthfulness of another witness, an inadmissible practice, as a witness may not testify that another mentally and physically competent witness is telling the truth. *See* ***State v. Jensen***, 147 Wis. 2d 240, 249, 432 N.W.2d 913 (1988). The father testified that:

> Q. And were you still upstairs when you continued to question her asking her how could [McKillion] help you if she was in his bedroom with the lights off?
>
> A. I asked her that once when he was upstairs, but then I continued to ask her that once I got her downstairs.
>
> Q. So it was right at that point then that you asked her to go downstairs?
>
> A. Right.
>
> Q. And once you were downstairs did you continue questioning her about how could [McKillion] help you with the lights off?
>
> A. Right. Yes, I did.
>
> Q. And is that the point when she got even quieter?
>
> A. Yes, and she started getting real teary eyed.
>
> Q. Let me ask you this. In your experience with your daughter is this a normal demeanor of her with you? Does she get teary eyed when you talk with her?
>
> A. No, she don't [sic]. It is one thing about me and my kids. We have a very good relationship. If my kids are telling me a lie, I know it instantly. If there is something I want to know, if I asked them something they tell me the truth. They will come right out and tell me. If I ask them something and they [are] lying to me, something they are trying to keep, something, they will quiet up. Especially with [N.M.]. She get real quiet and teary eyed. With the boys they stutter when they lie. If I ask them something they start to stutter. But if they come straight out and tell me what I want to know I know then they are not lying.

¶17 Contrary to McKillion's contention, N.M.'s father did not vouch for N.M.'s testimony. In fact, he said he thought she was *lying* when he spoke to her on the day of the attack. He testified to his general dealings with his children, and explained how he could tell when they were lying. He said nothing about her testimony during the trial. Thus, these observations of N.M.'s father concerning her conduct on the day of the assault did not violate the holding of ***Jensen***. Consequently, McKillion's attorney was not ineffective for failing to object to it.

C. McKillion failed to provide newly-discovered evidence requiring a new trial.

¶18 McKillion argues that the trial court should have granted his motion for a new trial because he presented newly-discovered evidence consisting of the recanting of N.M. in an affidavit. We disagree.

¶19 A defendant is entitled to a new trial on the grounds of newly-discovered evidence if he or she shows that: (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence which was introduced at trial; and (5) it is reasonably probable that a different result would be reached on a new trial. ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997) (citations omitted).

¶20 This test requires a defendant to establish "that the newly-discovered evidence created a reasonable probability that the outcome would be different on

retrial." ***Id.*** at 240-41.[4] The test has been stated by the Wisconsin Supreme Court as follows:

> [I]n determining whether there is a reasonable probability of a different outcome, the circuit court must determine whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt. If so, the circuit court must grant a new trial.

State v. McCallum, 208 Wis. 2d 463, 475, 561 N.W.2d 707 (1997) (footnote omitted).

¶21 Newly-discovered evidence that fails to satisfy any one of these five requirements is not sufficient to warrant a new trial. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). In addition, "when the newly discovered evidence is a witness's recantation, we have stated that the recantation must be corroborated by other newly discovered evidence." ***McCallum***, 208 Wis. 2d at 473-74.

¶22 McKillion bases his request on an affidavit signed by N.M. in April 1999. In it, it appears that N.M. states that she is not being forced to make the statement, and is doing so "because it is the right thing to do." She states that the incident never happened and that she "falsely accused [McKillion] of touching [her]." She explains her actions by claiming "it had something to do with all the confusing [sic] that took place on the evening that the touching incident was

[4] Although ***State v. Avery***, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997), held that a defendant was required to "establish by clear and convincing evidence that the newly discovered evidence created a reasonable probability that the outcome would be different on retrial," in ***State v. Armstrong***, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98, the Wisconsin Supreme Court "withdr[e]w language from ***Avery*** that concludes the reasonable probability determination must be made by clear and convincing evidence." ***Id.***, ¶162.

suppose to have happened." The letter also claims that, "I know that I was scared and that I was mad at [McKillion] because he had hit my father." While reading the affidavit of N.M. in isolation is quite compelling, the addition of her testimony at the hearing deflates the importance of the affidavit. The December 29, 2003, hearing revealed that the instigator for the affidavit recanting N.M.'s earlier testimony was McKillion's uncle.

¶23 At the hearing, N.M. testified that McKillion's uncle came to see her in the summer, and talked to her about wanting a statement saying that McKillion did not do what he was convicted of so "he could get him out of jail so he could take him to go live with him." She admitted writing parts of the letter, but disavowed any knowledge of much of the letter, and claimed that the part she did not write was not true. She also testified that she never went before a notary public, as is reflected on the document. She also was adamant that her testimony at trial was true, and that McKillion had assaulted her. Indeed, although the uncle refuted some of what N.M. claimed transpired, the uncle verified some of N.M.'s testimony. The uncle said he procured the letter on the advice of McKillion's appellate lawyer, who told him that what McKillion needed to get out of jail was a statement from N.M. He admitted to rewriting the letter because it was written in N.M.'s "broken English." N.M.'s mother also testified in a manner that raised grave questions about the author and the authenticity of the affidavit. After listening to the various witnesses over the course of numerous months, the trial court concluded that no recantation by N.M. ever occurred. The trial court's findings were that some efforts were made on the part of family members to assist McKillion and get him out of prison, and N.M. may have been a party to this effort, but she never stated or wrote that her testimony at trial was false.

¶24 We accept the trial court's findings because they are not clearly erroneous. Inasmuch as no recantation occurred, McKillion has not presented newly-discovered evidence that would likely lead to a different jury result. Consequently, he is not entitled to a new trial. For the reasons stated, we affirm.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.