COURT OF APPEALS
DECISION
DATED AND FILED

May 09, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1531-CR **Cir. Ct. No. 2002CF3354**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRIT L. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jerrit L. Brown appeals from an amended judgment of conviction for second-degree sexual assault of a child, and from a postconviction order denying his motion for resentencing. We conclude that Brown has not shown a reasonable probability that the trial court would have

imposed a shorter sentence had trial counsel been better prepared at sentencing, or that any of his postconviction considerations constituted new factors warranting sentence modification. Therefore, we affirm.

¶2 Brown entered a no-contest plea to the second-degree sexual assault of a fourteen-year-old child ("statutory rape"), in violation of WIS. STAT. § 948.02(2) (2001-02).[1] Brown and his friend, Joseph Bills, met the victim, H.N.L., and her friend at a bus stop.[2] Brown telephoned H.N.L. two days later. Brown brought H.N.L. to his home, where they smoked marijuana in his basement. As alleged in the criminal complaint,

> H.N.L. [then] asked the defendant to take her home. As H.N.L. was walking to the stairs, the defendant grabbed her from behind and began to unsnap her jeans. At this point, H.N.L. stated, "please don't, I'm only 14." The defendant then pushed H.N.L. onto the floor where she was lying on her stomach. The defendant pulled down her pants and underwear to her knees. H.N.L. stated that she was scared and yelling[,] telling the defendant to stop [because] she was only 14 years old. The defendant then said, "if you don't settle down, I'm gonna tie you up." H.N.L. stated that she was afraid so she no longer struggled with the defendant.

Brown then had repeated forcible sexual intercourse with her. H.N.L. was examined by a registered nurse at West Allis Memorial Hospital's Sexual Assault Treatment Center, who reported a .5 centimeter mark near her right hip, and

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[1] By entering a no-contest plea, Brown does not claim innocence, but implicitly acknowledges the sufficiency of the State's evidence to establish his guilt beyond a reasonable doubt. *See* WIS. STAT. § 971.06(1)(c) (2001-02); *see also* ***Cross v. State***, 45 Wis. 2d 593, 598-99, 173 N.W.2d 589 (1970). The consequences of a no-contest plea are substantially similar to those of a guilty plea. *See* ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980).

[2] These facts and those that immediately follow are taken from the criminal complaint, which Brown agreed could be used as the factual basis for his no-contest plea.

bruising and tearing of her hymen. H.N.L. also identified Brown from an array of photographs. Brown admitted having sexual intercourse several times with H.N.L. that afternoon, but claimed that this happened after "they started to make out."

¶3 Two months later, Bills was in custody on an unrelated matter. For consideration in that matter, Bills offered information about the Brown-H.N.L. sexual assault case. At sentencing, the prosecutor recounted Bills's statement to police of Brown's purported version of the incident.

> [The day following the sexual assault, Brown went to see Bills and told him], remember those two white hos we were talking to on the bus stop yesterday? I fucked the little bitch that you were talking to. I hope you ain't mad at me …. He then stated, that little bitch had a fat pussy. She had to be a virgin. I couldn't go all the way in her….
>
> Mr. Bills said that later that night, he did call the victim at her house, and he spoke to her and asked if she wanted to hang out, and the victim told Mr. Bills that she wasn't going to hang out with him because his friend had raped her. And Mr. Bills stated that before the conversation, he thought the sex between the victim and the defendant was consensual.[3]

(Footnote added.)

¶4 In exchange for Brown's no-contest plea, the State recommended a fifteen-year sentence without recommending any particular allocation between confinement and extended supervision. The prosecutor characterized this offense as forcible, recounted some of the allegations from the criminal complaint, Bills's statement, and excerpts from the examining nurse's report, and presented

[3] Consent is not a defense to statutory rape; in this case when the terminology is used to arguably imply that the contact was consensual, it means not forcible, not consensual in the legal sense. *See* ***State v. Fisher***, 211 Wis. 2d 665, 674-76, 565 N.W.2d 565 (Ct. App. 1997).

compelling arguments from the victim's parents, particularly her father. Defense counsel essentially did not dispute any of the prosecutor's sentencing presentation, nor did he "impeach" the credibility or potential evidence from Bills or the examining nurse, although he "would [have] characterize[d] it a little different[ly than they did]."[4] The trial court imposed a twenty-year sentence, comprised of fifteen- and five-year respective periods of confinement and extended supervision, to run consecutive to the four years remaining on Brown's revocation sentence.

¶5 Brown moved for resentencing based on trial counsel's claimed ineffectiveness and for consideration of four purportedly new sentencing factors. After a ***Machner*** hearing the trial court denied the motion, ruling that Brown had not shown that trial counsel's sentencing presentation was prejudicial, or that any of the four alleged considerations constituted new sentencing factors. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶6 To maintain an ineffective assistance claim, a defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

[4] Neither Bills nor the examining nurse testified at sentencing, thus, they could not be impeached. Defense counsel failed to dispute Bills's statement or the nurse's report.

different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). The defendant must allege "factual-objective" rather than "opinion-subjective" information. ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶7 Brown's ineffective assistance claim challenged trial counsel's effectiveness at sentencing. Trial counsel was nonargumentative, almost acquiescent in his approach, rather than challenging the prosecutor's presentation. Brown contends that he was essentially unrepresented at sentencing because trial counsel's passive, cooperative strategy, deprived him of the advocate to whom he was entitled. His ineffective assistance theory however, is that, despite his no-contest plea, he was punished more severely than even the prosecutor recommended because the trial court viewed this sexual assault as forcible, as opposed to a situation with an underage girl that simply went too far. He contends that had his trial counsel investigated the facts and various witnesses, he would have been Brown's sentencing advocate, rebutting the prosecutor's mischaracterizations, and presenting a more sympathetic figure, resulting in a less harsh sentence.

¶8 During the ***Machner*** hearing, an investigator testified how trial counsel could have given a more compelling sentencing presentation. *See* ***Machner***, 92 Wis. 2d at 804. The investigator, unlike trial counsel, interviewed Bills. In doing so, she discovered that when Bills spoke with police about Brown, he was intoxicated and "trying to cut a deal." Bills may also have been angry at Brown because he had been interested in H.N.L., who, after her encounter with

Brown, had no interest in Bills. The investigator also went to view Brown's basement, and explained the implausibility of the examining nurse's findings of essentially no injuries, when the assault occurred on a concrete floor covered by only a thin indoor/outdoor carpeting, which would seemingly have produced bruising or carpet burns, had the sexual contact been forcible. The investigator testified that she knows, from her extensive experience as an expert witness in sexual assault cases, that this particular examining nurse always finds the victim's injuries (regardless of how minimal) consistent with force. The investigator also discovered that the victim's parents were engaged in a custody dispute and that H.N.L.'s father lost placement of her because of the sexual assault.

¶9 Brown testified how dissatisfied he was that "[e]very time [he] would try to bring something to [trial counsel's] attention and ask if he [could] check it out, [trial counsel] kind of blew it off." He claimed that he told his counsel to interview Bills, and to look for neighbors who may have seen H.N.L. and corroborated his version of the incident, namely that she was not upset when she left that afternoon, demonstrating that their sexual encounter was not unwanted. Brown repeatedly told his counsel to tell the judge that the sexual encounter was consensual, but trial counsel refused. Brown testified that he was shocked at sentencing when his counsel essentially agreed with the prosecutor's characterization of the incident. He was not asked, however, why he did not express his shock at sentencing.

¶10 Trial counsel testified that the defense strategy was for Brown to be cooperative, while impressing upon the court that Brown had not forced himself on the victim. Trial counsel was well aware of Brown's position – that the encounter was "consensual" – however, the trial court could "t[a]k[e] [Brown's preferred strategy] the wrong way … [and] could come down awfully hard [on

him] for that." Trial counsel testified that he had hoped that "the judge could pick up on what I was trying to say without infuriating – possibly infuriating the judge. You know, consensual." Trial counsel's greatest fear was to appear as if he were arguing with the prosecutor, after Brown had entered a no-contest plea to statutory rape. Trial counsel attempted to distinguish the prosecutor's assessment of the facts from that of the defense, without appearing argumentative. When asked why he did not challenge the prosecutor's characterization of the incident as a forcible rape, trial counsel testified that his strategy was to be cooperative, not argumentative.[5]

¶11 Trial counsel explained that the medical records substantiated an injury to the hip and to the hymen, which, if ignored or minimized, could anger the trial court. For example, had he challenged the arguable lack of injury to the victim, the prosecutor could have emphasized the injury to her hip, and the bruising and tearing of her hymen. Likewise, had he emphasized various problems with Bills's credibility, those problems would not have directly undermined the substance of Bills's statement. An aggressive defensive strategy could have been counterproductive, and any quarrel over the facts could have compromised his overriding strategy of cooperation.

¶12 At the close of the testimony, the trial court determined that Brown's sentencing presentation "could have been handled a lot better." It concluded, however, that absent a fact-finding hearing involving all of the potential witnesses to determine whether the sexual encounter was forced, the defense sentencing

[5] Trial counsel learned this strategy in a sentencing training seminar.

presentation would "most likely not [have] change[d] the outcome." The trial court found that

> effective assistance of counsel at sentence was somewhat deficient, that [trial counsel] could have given more time to the sentencing arguments. [The trial court] think[s] that he tried his best to walk that fine line, and [the trial court] do[es] agree with [postconviction counsel] that maybe some additional investigation would have helped him in terms of making a different kind of sentencing argument.
>
> On the other hand, the second prong of the test was that that deficient performance prejudices the defendant, and [the trial court] do[es]n't see how that would have prejudiced the defendant. Barring some very clear evidence that this was a cooperative situation, [the trial court] do[es]n't know where that comes from except from maybe an admission by the victim that the Court would have viewed this as the defendant not taking full responsibility for his actions, and the sentence would have remained the same.
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> ….
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> If [the trial court] had heard everything that [it] heard today and before from [Brown's private investigator] on the last court date, none of that in [the trial court's] mind proves to [it] this wasn't a forced situation. Whether we're talking about a forced situation, we're not talking about being savagely beaten. [The trial court doesn't] think there w[ere] any allegations that the victim in this case was savagely beaten. It was that she resisted, and she said no, and Mr. Brown continued. When we talk about a forced situation, that's what a forced situation is.
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> The medical records and medical information that's been provided to [the trial court] in no way shows that this is consensual or cooperative.
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> ….
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> [The trial court] guess[es] the bottom line … from what [it has] heard here [is] will that change [its] mind? It won't have changed [its] mind. [The trial court] was convinced this was a very serious situation, that [Brown] had been through the system on a number of occasions for violent offenses. [Brown was] on parole, that [he] had a

> young victim here, and the Court made its decision accordingly.
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> [The trial court] understand[s] that it's exceeding the district attorney's recommendation, but that's what happens from time to time. And in certain instances the Court goes below the district attorney's recommendation also significantly to the distress of the State. It doesn't always go one way in this court. It shouldn't go one way in any court, but it's pretty clear from the way [this branch of the trial court] handle[s] things that it doesn't go one way in this court. [This branch of the trial court] look[s] at all the facts. I[t] look[s] at all arguments. I[t] make[s] a decision. That's what [it] believe[s] is right based on all the facts and everything that [it has] been told.

¶13 The trial court concluded that trial counsel's performance at sentencing was "somewhat deficient."[6] The trial court then explained why it nevertheless determined that Brown had not established prejudice. We are not persuaded that there was a reasonable probability that the trial court would have imposed a less harsh sentence had trial counsel been better prepared to challenge the prosecutor's factual assessment of the situation or proffered the potential witnesses suggested by postconviction counsel. Stated otherwise, unless the victim had admitted that she had agreed to the encounter, it was not reasonably probable that the impeachment-type evidence presented in the postconviction hearing would have changed the trial court's mind because even such an admission would not change the facts comprising the elements of the offense. Therefore, Brown has not established the prejudice necessary to prevail on an ineffective assistance claim.

[6] The absence of prejudice removes the need to determine whether "somewhat deficient" was adequate proof of deficient performance.

¶14 Brown also seeks sentence modification on the basis of four new factors: (1) Bills's status as an intoxicated felon "trying to work out a better deal" when he gave his statement to police, and his recantation to Brown's girlfriend and the postconviction investigator; (2) the minimal nature and amount of the victim's injuries also negating the purported use of force; (3) the investigator's conclusion that the cement floor with minimal floor covering would have likely produced more injuries had the encounter been forced; and (4) the bitter custody battle between H.N.L.'s parents, which may have affected the unduly harsh sentencing remarks of H.N.L.'s father who lost placement of her because H.N.L.'s mother portrayed him as an irresponsible parent as a result of this sexual assault.

¶15 A new factor is

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "'new factor' … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶16 Preliminarily, these purported new factors are more apt to form the basis of ineffective assistance claims or are in the nature of impeachment-type allegations against Bills, the examining nurse, and the victim's father, all who cast Brown in a particularly unfavorable context, rather than new factors warranting sentence modification. We are mindful however, that Brown entered a no-contest plea to the second-degree sexual assault of this fourteen-year-old victim. These

alleged new factors would have only cast doubt on each potential witness, they would not contradict the substance of their statements. Under these circumstances, it is difficult to envision that the trial court would have imposed a different sentence had Brown shown these witnesses' various motives when recommending a sentence for a statutory rapist.

¶17 We now address whether the four factors Brown raised are indeed new, entitling him to sentence modification. These potentially new factors involve whether the sexual assault was forcible. This offense did not require proof of force; it required proof of sexual contact, and that the victim was not yet sixteen years old. *See* WIS. STAT. § 948.02(2) (2001-02). Brown stipulated to the State's proof of those two elements. Consequently, it was not "highly relevant to the imposition of sentence," whether Bills was "trying to cut a deal" by further incriminating Brown, or whether the nurse examiner or the victim were questioned about the absence of more serious injuries despite the cement floor, or whether there was a bitter custody dispute pending between the victim's parents. *See* ***Rosado***, 70 Wis. 2d at 288. Moreover, the victim claimed that Brown threatened her when he told her that if "[she] d[id]n't settle down, [he was] gonna tie [her] up." She then claimed "that she was afraid so she no longer struggled." This also could explain the alleged absence of (more) injuries. Bills's recantation would not have altered the victim's statement, or Brown's admission to having had sexual intercourse with her. Consequently, even if the recantation had been considered a new factor, it did not "frustrate[] the purpose of the original sentence," which was imposed for the statutory rape of a fourteen-year-old girl. *See* ***Michels***, 150 Wis. 2d at 99.

By the Court.—Judgment and order affirmed.

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