COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP611 **Cir. Ct. No. 1997CF74**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. YATES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Michael Yates appeals from a circuit court order denying his WIS. STAT. § 974.06 (2003-04)[1] motion without an evidentiary hearing. Because the circuit court did not erroneously exercise its discretion in denying the motion without a hearing, we affirm.

¶2 The circuit court has the discretion to deny a WIS. STAT. § 974.06 motion without a hearing if the motion is legally insufficient. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. We may independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

> The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Allen, 274 Wis. 2d 568, ¶12 (footnote omitted). We affirm the circuit court's denial of Yates' § 974.06 motion without a hearing because the record conclusively demonstrates that Yates was not entitled to relief on his ineffective assistance of trial counsel claim.

¶3 In order to establish ineffective assistance, Yates must establish that his counsel's performance was deficient and that the deficient performance prejudiced him. *See* ***Allen***, 274 Wis. 2d 568, ¶26. "The test for prejudice is whether our confidence in the outcome is sufficiently undermined." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Counsel was not ineffective if counsel

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

failed to pursue a meritless claim. ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

¶4 In 1996, a jury convicted Yates of one count of repeated sexual assault of the same child. Thereafter, the circuit court dismissed the case without prejudice because Yates' offenses occurred before the effective date of the statute under which he was prosecuted. The State filed a new complaint which charged four counts of first-degree sexual assault of a child and four counts of incest. At the second trial in 1998, the jury convicted Yates of all counts, and we affirmed. Thereafter, Yates filed a WIS. STAT. § 974.06 motion alleging ineffective assistance of trial counsel. Yates had the same counsel at both trials. The circuit court denied the § 974.06 motion without a hearing, and Yates appeals. We will recite the facts as necessary to address the appellate issues.

¶5 Yates first argues that his trial counsel was ineffective because he did not argue that the evidence adduced at the 1996 trial was insufficient to convict him and double jeopardy precluded a second trial.[2] *See* ***State v. Ivy***, 119 Wis. 2d 591, 610, 350 N.W.2d 622 (1984). The circuit court denied this claim without a hearing. The record of the first trial demonstrates that Yates is not entitled to relief on this claim.

¶6 We review the sufficiency of the evidence to determine whether the evidence, "viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact,

[2] Trial counsel challenged the second prosecution on double jeopardy grounds, but counsel did not cite insufficiency of the evidence at the first trial among the double jeopardy grounds.

acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (citation omitted). "We will not substitute our evaluation of the evidence for that of the jury." ***State v. Barksdale***, 160 Wis. 2d 284, 290, 466 N.W.2d 198 (Ct. App. 1991). The jury evaluates the credibility of the witnesses, and inconsistencies in the testimony do not render the testimony incredible as a matter of law. ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978). Additionally, "[i]f more than one inference can be drawn from the evidence, the inference which supports the jury finding must be followed unless the testimony was incredible as a matter of law." ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). We defer to the jury's weighing and sifting of conflicting testimony, recognizing the jury's ability to assess "those nonverbal attributes of the witnesses which are often persuasive indicia of guilt or innocence." ***Id.***

¶7 The sexual assaults allegedly occurred while the then three-year-old child slept in the same bed as her mother and Yates. The complaint for the 1996 trial alleged that the offenses occurred from April to September 1994. Yates' challenge to the sufficiency of the evidence at the 1996 trial focuses on the sleeping arrangements during this period. At the first trial, the State had to show beyond a reasonable doubt that Yates had sexual contact with the child on three occasions between April and September 1994. *See* WIS. STAT. § 948.025(1) (1993-94) (a person violates the statute by committing three or more sexual assaults of the same child within a specified period of time).

¶8 Yates' wife testified that from April to July 1994, she and Yates shared the bedroom where the child claimed the sexual contact occurred. The child joined Yates and her in the bed on most nights. The evidence showed that Yates slept in the bed from April to July and that does not eliminate the possibility

that the three incidents occurred prior to July. Yates' wife also testified that the child told her that the assaults happened several times. A child protection worker testified that the child told her that Yates "did the gross stuff every night." Doctor Anna Salter testified that in a child's understanding, "every night" meant frequently. This evidence is not incredible as a matter of law and was sufficient to support the jury's verdict in the first trial. Therefore, any challenge to the sufficiency of the evidence at the first trial would have failed, and trial counsel was not ineffective for failing to make that challenge.

¶9 Yates next argues that his trial counsel was ineffective for not arguing that the issuance of a new complaint with seven new charges was an act of prosecutorial vindictiveness. The circuit court rejected this claim without a hearing because it did not find any evidence substantiating the claim.

¶10 A presumption of prosecutorial vindictiveness arises when a prosecutor files a more serious charge against a defendant after the defendant has won a new trial on appeal. ***State v. Johnson***, 2000 WI 12, ¶32, 232 Wis. 2d 679, 605 N.W.2d 846. This case does not involve a new trial won on appeal. Rather, after a jury convicted Yates, the State discovered that the case had erroneously proceeded under a statute which was not in effect at the time of Yates' offenses. The State explained that the additional charges arose from evidence adduced during the first trial. Finally, we note that although Yates faced additional charges, the penalty remained the same as in the first, single count case: life imprisonment without the possibility of parole. Because the record demonstrates that Yates was not entitled to relief on this claim, the circuit court did not err in denying the claim without a hearing.

¶11 Yates next contends that his trial counsel was ineffective for failing to seek dismissal of counts five through eight of the new complaint due to the absence of probable cause. Counts five through eight alleged sexual contact and incest in June and July 1994. We have already held that the evidence at the first trial was sufficient, and the evidence covered the period alleged in the new complaint. Therefore, there was probable cause for these charges, trial counsel was not ineffective, and the circuit court did not err in rejecting the claim without a hearing.

¶12 Yates next argues that his trial counsel was ineffective because he failed to challenge other acts evidence. The admissibility of other acts evidence is governed by a three-part test: the evidence must be admitted for an acceptable purpose under WIS. STAT. § 904.04(2), the evidence 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 parts of the test when reviewing other acts evidence in sexual assault cases, particularly in cases involving children. ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. Other acts evidence is admissible to show motive to obtain sexual gratification. ***Id.***, ¶¶57-59.

¶13 The circuit court admitted evidence of Yates' past sexual assault of young boys because it related to motive and to the testimony of Dr. Salter. Doctor Salter testified about a study showing that twelve percent of pedophiles who sexually assaulted young boys outside the home also sexually assaulted young girls inside the home when the offender had access to such girls. Another expert also referred to the study.

¶14 In rejecting this claim without a hearing, the circuit court ruled that the evidence was relevant to the expert's testimony about cross-gender sexual assault of children and bore upon Yates' motive. We agree that the expert opinion was sufficient to warrant the admission of evidence of Yates' prior offenses against young boys and placed such evidence in context. The record does not support Yates' claim that he was prejudiced by his trial counsel's failure to challenge this evidence.

¶15 Yates next argues that his trial counsel was ineffective because counsel did not object to evidence that Yates was a pedophile and even referred to him as a pedophile. The circuit court rejected this claim without a hearing because defense counsel's trial strategy[3] was evident from the record: admit Yates' pedophilia and sexual attraction to young boys to undermine the charge that he had sexual contact with a young girl and bolster his claim that the sexual assault allegations were fabricated by his wife to gain an advantage in their divorce.[4]

¶16 Our review of the record confirms the circuit court's assessment of trial counsel's strategy. Yates' wife testified that she was aware of Yates' prior sexual contact with children and that she learned of this conduct a few months after they were married in March 1988. They subsequently had two children and separated in September 1994. Counsel conceded the gravity of Yates' prior conduct, but argued that Yates' wife was not credible in her accusations because

[3] Yates questions how the circuit court could have discerned trial counsel's strategy without a hearing under ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), at which trial counsel would have testified. This claim was properly rejected without a hearing because counsel's strategy was obvious from the record.

[4] The child first described the assaults to Yates' wife who related the disclosure to others.

she remained married to Yates after learning of his past offenses against children and allowed a young girl to share their bed. Counsel argued that Yates' wife hated him and fabricated the child's accusation, citing the convergence of the divorce proceedings and the sexual assault allegations.

¶17 In order to present this defense and attack the credibility of Yates' wife, counsel necessarily had to refer to Yates' history of child sexual assault and pedophilia. The evidence that Yates was a pedophile, which was already admitted in relation to the expert testimony, was a foundation for this defense strategy. Counsel may select a particular defense strategy from the available alternatives. ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992), *cert. denied,* 510 U.S. 830 (1993). Merely because counsel's strategy was unsuccessful does not mean that counsel's performance was legally insufficient. ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987).

¶18 Yates next complains that the circuit court failed to independently evaluate his claims that trial counsel did not: (1) object to the State's expert's testimony that the victim's statements were truthful, (2) present exculpatory evidence on the issue of whether any assaults were committed in June and July 1994, and (3) object to the introduction of Yates' prior testimony as irrelevant and prejudicial. In rejecting these claims, the circuit court "adopt[ed] generally the arguments of the district attorney" in response to Yates' arguments. While it is true that a circuit court must exercise independent judgment and support its decision by a written opinion, ***Allen***, 274 Wis. 2d 568, ¶9, we may affirm if the record provides a basis for the circuit court's decision, ***Pharr***, 115 Wis. 2d at 343.

¶19 Yates claims that trial counsel should have objected to Dr. Salter's testimony that the child made truthful statements to Yates' wife and to

investigators. Yates complains that Dr. Salter and Detective Schipper opined that the child was credible when they testified that the child did not seem to have been coached and that no suggestive questions were put to her. Additionally, Yates complains that his counsel failed to object to Dr. Salter's testimony that Yates was not telling the truth and would be unable to tell the truth because he was a pedophile.

¶20 A witness may not vouch for the truthfulness of another witness. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). However, an expert may testify about whether the victim's behavior is consistent with the patterns and characteristic behaviors of victims of the same type of crime. ***State v. Jensen***, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988). Doctor Salter reviewed the police reports and transcripts of the victim's statements, described the characteristics of a child's false sexual assault allegation,[5] and stated that she did not find such characteristics in this case or detect any coaching, suggestive or leading questioning in the victim's interview. Doctor Salter was aware of Yates' admission that he is an experienced liar, and Dr. Salter testified that lying is a pattern of those who sexually assault children. Doctor Salter's testimony was within the bounds of ***Jensen***, and Yates' trial counsel was not ineffective for failing to object to the testimony. The circuit court properly rejected the claim without a hearing.

¶21 Detective Schipper's testimony was also within the bounds of ***Jensen.*** Detective Schipper is an experienced, trained child sexual assault

[5] Doctor Salter testified that a child making a false or coached accusation would employ adult language and lack significant detail in the description of the assault.

investigator. She testified that the child's interview in this case was proper and that the language used by the child to describe the incidents was not inconsistent with how a child would describe such incidents.

¶22 Yates next argues that his trial counsel failed to impeach his wife with her testimony from the first trial. In contrast to the first trial where counsel questioned Yates' wife about the sleeping arrangements between April and September to show that Yates did not sleep in the bed during the entire period, trial counsel did not extensively question Yates' wife at the second trial on this point. At the second trial, Yates' wife testified that the child never specified the months the assaults occurred, but that from her claim that they occurred in the back bedroom, Yates' wife was able to pinpoint the April to September 1994 timeframe. Trial counsel did not ask any other questions about the time frame during which the assaults occurred. The question is whether, on the record before the court, this omission prejudiced Yates' defense. We conclude that it did not. Yates' counsel cross-examined Yates' wife and honed in on her credibility and her motive. Trial counsel questioned Yates' wife to elicit support for the theory of defense: that she hated Yates and had a motive to fabricate the sexual assault claim to gain an advantage in their divorce. Further questioning Yates' wife about the sleeping arrangements would not have materially altered the jury's perception of her testimony.

¶23 Yates next contends that trial counsel was ineffective because he failed to object to the introduction of portions of Yates' testimony from the first trial; Yates did not testify at the second trial. Yates claims that the portions read to the second jury were irrelevant and unfairly prejudicial.

¶24 A defendant's testimony at a prior trial is generally admissible at a subsequent trial. ***Harrison v. United States***, 392 U.S. 219, 222 (1968). Yates' trial counsel argued that if the State was going to present Yates' cross-examination at the first trial, Yates' direct testimony should also be presented in the interests of fairness and completeness. Trial counsel did not argue that the testimony on cross-examination should be excluded as irrelevant and unfairly prejudicial. The circuit court admitted the portions offered by the State as statements of a party opponent.

¶25 Trial counsel's failure to argue that the testimony was irrelevant did not prejudice Yates because the testimony could not have been excluded on that ground.[6] The testimony went to guilt or innocence. That Yates' cross-examination in the first trial was damaging does not require its exclusion. Trial counsel was not ineffective, and the circuit court did not err in rejecting this claim without a hearing.

¶26 Yates contends that his trial counsel was ineffective because he did not object to the prosecutor's reference during closing argument to Yates as a convicted pedophile who continued to seek out the company of young children and who had lied about his sexual contact with children. Trial counsel was not ineffective because the prosecutor referred to evidence in the case and did not ask the jury to consider matters outside the evidence. ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Additionally, the court cautioned the jury that the arguments of counsel were not evidence.

[6] WISCONSIN STAT. § 908.045(1) governs former testimony and deems admissible testimony given as a witness at another hearing.

¶27 Finally, Yates seeks a new trial in the interest of justice. The parties debate whether we have the power to grant such relief in a WIS. STAT. § 974.06 setting. We will assume without deciding that we have such power. Having rejected all of Yates' previous claims of error, we conclude that a new trial is not warranted. A final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Order affirmed.

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