COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1142-CR **Cir. Ct. No. 2005CF398**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK JOHN HANNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 VERGERONT, J. Patrick Hannon appeals the judgment of conviction for one count of third-degree sexual assault and one count of fourth-

degree sexual assault[1] and the circuit court's order denying his motion for postconviction relief. He contends his trial counsel provided ineffective assistance by failing to interview and present testimony from three witnesses whose testimony, he asserts, would have either corroborated Hannon's position that the sexual contact was consensual or undermined the credibility of the complainant. This constituted deficient performance, according to Hannon, and the deficient performance prejudiced his defense. We conclude counsel did not perform deficiently in deciding not to interview these three witnesses. We therefore affirm the judgment of conviction and the postconviction order.

BACKGROUND

¶2 Danielle B. was at Hannon's apartment, along with three other people, in the early morning of April 7, 2005. Later that day, accompanied by her friend, Michelle Wirth, she arrived at Waukesha Memorial Hospital and told the nurse on duty that she had been sexually assaulted the night before. She subsequently identified Hannon as the person who had sexually assaulted her. The criminal complaint charged Hannon with fourth-degree sexual assault, based on Danielle's allegations that Hannon had put his hand under her shirt and touched her breast over her bra without her consent; third-degree sexual assault based on her allegations that he had sexual intercourse with her without her consent; and battery[2] based on her allegations that he had bitten her in two places on her neck without her consent.

[1] *See* WIS. STAT. § 940.225(3) and (3m), respectively. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] *See* WIS. STAT. § 940.19(1).

¶3 At trial Danielle testified as follows. She met Hannon on the evening of April 6, 2005, while she was at a bar with her friend, Jennifer Reitjens. Two acquaintances of Danielle worked at this bar; after Danielle and Jennifer met Hannon, the five of them went to a nearby bar owned by Hannon's father. When the bar closed Hannon suggested that everyone come up to his apartment, which was above the bar, and they agreed. They sat in the living room and Hannon got them drinks. Eventually Danielle said that she had to use the bathroom and asked Hannon where it was; he said he would show her. He led her through a small bedroom off the living room through a larger bedroom to the bathroom. She told him "thank you" but he did not leave. Finally, she pulled down her pants and started to urinate, at which point he crouched down and started touching her and trying to kiss her; he put one hand under her shirt on top of her bra and was rubbing her breast. She pushed him away and told him to stop. As he walked out he said, "why do you have to be such a tease?"

¶4 Danielle further testified that Hannon left the bathroom but came back to stand at the doorway between the bathroom and the larger bedroom. When she asked him to move, he just stood there. She pushed past him and he grabbed her and threw her on the bed. He pulled down her pants and underwear and started having intercourse with her without her consent; she told him to stop and said "no," but he did not stop. She screamed for Reitjens, but no one came. Hannon bit her on the neck twice and it hurt. She was crying and he said, "don't you like me," and she said, "no, I don't." He did not stop when she told him to stop. When he finally got off her, she went into the living room and told Reitjens she wanted to go home. Reitjens and the two others in the living room, Luke Jajtner and Stewart Stevens, asked her what was wrong. She started crying and said to Jajtner and Stevens, "I've just been violated." She left and went to bed

when she got home. The next day she spoke to her friend Wirth by telephone and told her what happened. Wirth told Danielle she needed to go to the hospital, and Wirth took her to a hospital emergency room.

¶5 In addition to Danielle's testimony, the State presented Reitjens's and Stevens's testimony about what they observed that evening. Neither saw anything that occurred between Danielle and Hannon in the bathroom or in the bedroom. Stevens testified that when Danielle came back to the living room, she said that she had been sexually assaulted, and she started to cry and said she wanted to leave. According to Stevens, Hannon came into the living room after Danielle left and said "he was fucking her" and she said stop, so they stopped. Hannon seemed really upset. Stevens testified that Hannon said, "he didn't need this in his life. He said that basically he didn't do anything wrong."

¶6 Reitjens testified that when Danielle returned to the living room she said she wanted to go but did not tell her why. Hannon returned to the living room a little bit after Danielle did and wanted to know what was wrong with Danielle. After Danielle left he kept asking "what's wrong, what's wrong with her," and Reitjens testified that she told police "he was in [her, Reitjens's] face." Both Reitjens and Stevens testified that they did not hear Hannon or the victim when they were in the bedroom.

¶7 The State also presented the testimony of the police officer who interviewed Danielle at the hospital. Another police officer read the statement Hannon gave to the police. Hannon stated that he and Danielle "started to make out" after she left the bathroom; she told him to lock the door and he did. She took her clothes off.

> I think she put [my penis] in her vagina. We had sex … this way for about five minutes to 10 minutes. …
>
> She said we got to stop. I had stopped. … [S]he … started to get dressed….
>
> I wanted to finish and get my rocks off. I said, what's going on? Then I started to get dressed and I repeated what's going on. I did not force her to do anything.

¶8 Hannon's defense was consent. He did not call any witnesses. The defense attempted to establish through cross-examination and use of prior statements and prior testimony that there was consensual sexual contact, that at some point Danielle said stop, and Hannon stopped. Trial counsel's cross-examination and closing argument focused on inconsistencies in Danielle's prior statement and testimony, the implausibility of her account of how the sexual intercourse actually occurred, the implausibility of her screaming and not being heard in such a small apartment, the fact that she did not go to a hospital or call the police initially but went to the hospital only the next day when her friend told her she should; the evidence of kisses she gave Hannon before she went to the bathroom; and her own prior statement that she gave Hannon a false phone number before she left the apartment.

¶9 The jury returned a verdict of not guilty on the battery charge and guilty on the second- and third-degree sexual assault charges. Hannon filed a postconviction motion in which he asserted that defense counsel was ineffective for failing to interview and present trial testimony from three witnesses who could have provided favorable defense evidence.[3] Specifically, he asserted that Wirth could have provided testimony about a conversation she had with Danielle that

[3] There were other claims of ineffective assistance of counsel in the motion but they are not pursued on appeal.

suggested that money was a motive for her to falsely accuse Hannon; that Jajtner could have testified on the apartment layout and construction, undermining Danielle's testimony that she called out; and that Zachary Smith could have testified to several inconsistent accounts from Danielle of her encounter with Hannon, one of which corroborated Hannon's version.

¶10 The circuit court held a ***Machner*** hearing[4] at which Hannon's trial counsel testified, along with Wirth, Jajtner, Smith, and other witnesses. The court concluded that defense counsel was not deficient and provided "competent, thorough and professional representation." The court also concluded that any failure to present certain evidence or specific testimony did not prejudice the defense, as it would have been either "inadmissible, cumulative, or ultimately have had no effect on the verdict of the jury."

DISCUSSION

¶11 On appeal, Hannon renews his argument that defense counsel performed deficiently by failing to interview and present the testimony of Wirth, Jajtner, and Smith.

¶12 A defendant alleging ineffective assistance of counsel must show first that counsel's performance was deficient because he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, the defendant must show that counsel's deficient performance prejudiced the defense in that the "errors were so serious as to deprive the defendant of a fair trial, a trial

[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

whose result is reliable." ***Id.*** Because it is necessary to establish both deficient performance and prejudice, we reject a claim of ineffective assistance of counsel if either one of these components has not been established. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶13 To establish that an attorney's performance was deficient, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. The court's inquiry is highly deferential because it is "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." ***Id.*** at 689. Therefore, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** (citation omitted).

¶14 When we examine an attorney's performance we must "reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time." ***Id.***

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. … [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91.

¶15 We review a circuit court's ruling on an ineffective assistance claim as a mixed question of fact and law. We accept the circuit court's findings of fact

unless they are clearly erroneous but independently review whether the constitutional requirement for ineffectiveness is met. ***Johnson***, 153 Wis. 2d at 127-28.

I. Michelle Wirth

¶16 Wirth was the friend who Danielle called the day after the incident with Hannon. She told Danielle she should go to the hospital, and took her there. She testified at the postconviction hearing that several weeks later she was talking to Danielle and Danielle stated that "even if [Hannon] doesn't go to jail, my mother said just the fact it happened on Hannon's property meant something." Wirth understood this to mean that Danielle's mother meant there "would be money in it." Wirth testified that this comment sent up a "red flag" about Danielle's credibility. By the time of the trial Wirth had stopped spending time with Danielle.

¶17 Hannon argues that defense counsel was deficient for not interviewing Wirth before the trial, and, had he done so, he would have learned of Danielle's comment to Wirth. Wirth's testimony on this point would have been helpful to the defense, Hannon argues, because it suggests a financial motive for a false accusation against him.

¶18 Defense counsel testified at the ***Machner*** hearing that he read Wirth's statement to the police but decided not to call her and he was happy the State did not call her. She was the person who urged Danielle to go to the hospital and who took her there and supported her; in his view, had Wirth not intervened, Danielle probably would not have reported the incident at all. Based on Wirth's statement, he believed she would testify about how upset Danielle was and the bruises Wirth observed, and this would corroborate Danielle's testimony that she

had been assaulted. If Wirth testified inconsistently with her statement, she could be impeached with it. Counsel did consider a financial motive because of information he had that Danielle had previously made a claim of sexual harassment at work, but the people who initially made those statements would not speak any more on advice of counsel and he did not think that evidence would be admissible under the rape shield law. At the time of the trial he had no evidence that there was a lawsuit pending against Hannon, and as far as he knew there still was not.

¶19 We conclude it was objectively reasonable for defense counsel not to interview Wirth to see if he should call her as a witness. He had her statement to the police, which he read, and it was damaging to the defense. Hannon points to nothing that should have alerted defense counsel that Wirth might have evidence helpful to the defense. It was therefore reasonable for him to assume she would testify consistent with her statement. In effect, Hannon's argument is that defense lawyers must always interview or attempt to interview all possibly significant witnesses even if there is no reason to think the witness has something helpful to offer the defense because the witness might say something unexpected. We disagree that the failure to interview all such witnesses is deficient performance. Defense counsel must make choices as to how best to spend their time and resources. Here, defense counsel's decision not to interview Wirth was reasonable based on the information he had at the time.

II. Luke Jajtner

¶20 Jajtner, who was in the apartment, was not called as a witness at trial by either the State or Hannon. However, Jajtner was called by the State and cross-examined by defense counsel at Hannon's probation revocation hearing, which

was held two months after the incident and four months before the October 2005 trial. In that testimony, Jajtner confirmed Danielle's testimony that she had said she had to go to the bathroom and Hannon left the living room behind her; that she returned before Hannon—he did not know how long she was gone; that she was upset; and that she left the apartment "almost right away." He remembered that Hannon closed the door to the bedroom. He also testified that Danielle told him she had "been violated."

¶21 At the ***Machner*** hearing on January 22, 2007, Jajtner testified that, at least once a week during the "last year," he was at the apartment Hannon had lived in because there was a new tenant who he "h[u]ng out with on a fairly regular basis." He testified that the doors into the small bedroom from the living room and then into the larger back bedroom are light doors, "I'd guess that they'd be hollow." When he is in the living room he can generally hear people walking around in the small bedroom; and he thought sound traveled pretty well through the apartment. Although the television was on the night of the incident, it was quiet enough that they were able to have a normal conversation without shouting; and he did not hear any sounds from the back of the apartment—no screaming or yelling or any sounds that suggested a struggle was going on. He demonstrated the distance from the couch he was sitting on in the living room to the door going into the small bedroom to be about eight feet.

¶22 Defense counsel testified at the ***Machner*** hearing that he decided not to call Jajtner after reviewing his statement to the police and questioning him at the probation revocation hearing. Based on those, he thought Jajtner's testimony would be essentially the same as Reitjens's and Stevens's, and there would be no tactical advantage to having another person testify that Danielle was upset when she came out of the bedroom, said she had been violated, and left right away.

¶23 Hannon argues that Jajtner's testimony would have been a more credible impeachment of Danielle's testimony that she screamed for help because he testified the television was not on loud, and, most importantly, he knew the layout, size, and sound-carrying characteristics of the apartment. Hannon points out that this was not brought out by Jajtner's statement or his hearing testimony, and defense counsel was deficient for not interviewing him on these points.

¶24 There is a significant deficiency in Hannon's argument because it does not focus on the pretrial circumstances, when, he claims, defense counsel should have interviewed Jajtner and inquired into his knowledge about the apartment. Jajtner testified in January 2007 that "in the last year" he was at the apartment a lot, but he did not think he had been in the apartment before the incident between Danielle and Hannon; before that incident he had met Hannon only a half a dozen or a dozen times when he came to the bar where Jajtner worked. There is no evidence that Jajtner had any knowledge about the sound-carrying characteristics of the apartment before the trial, which took place in early October 2005, and no evidence that defense counsel had any reason to think that Jajtner might have this knowledge.

¶25 As for the size and layout of the apartment, there were other sources of evidence known to defense counsel, and they were presented at trial. Defense counsel had a reasonable basis, from the prior statements and testimony of Reitjens and Stevens, to expect they would testify at trial that they heard nothing from the bedrooms, which they did. He also knew from prior testimony and statements that the television was on and the people in the living room were talking. While Reitjens testified at trial that the television was "loud," defense counsel established on cross-examination that she did not have to raise her voice to be heard and she could hear the others to whom she was talking.

¶26 We conclude it was objectively reasonable for defense counsel not to interview Jajtner before trial to inquire about the loudness of the television, the layout of the apartment, and the sound-carrying characteristics of the apartment. He had a reasonable basis for believing that Jajtner's testimony would not add anything significant on these points, that his testimony favorable to Hannon could be established through other witnesses, and that it was better to avoid having a third person repeat testimony that was unfavorable to Hannon's defense.

III. Zachary Smith

¶27 Zachary Smith was a good friend of Hannon. Smith testified at the ***Machner*** hearing as follows. He knew Danielle because he worked at a bar Danielle frequented. After he learned that Hannon had been arrested for assaulting Danielle, a couple months before the trial, Danielle brought up the subject in three different conversations with him. In one conversation she said that, after she came out of the bathroom, Hannon was on the bed and asked her to join him there and watch television with him. Smith testified "And it was, you know, basically what I thought was okay, there's cuddling. And all of a sudden she started saying, well, he tried doing this and this to me …, she asked [him] to stop, and then he did." In a second conversation she said when she came out of the bathroom, Hannon was standing there, they were talking, and then "she was thrown on the bed by [Hannon] and clothes were being ripped and torn at, and she's—was basically screaming for help." This description sounded like "an assault," but she did not mention a "sexual part." In the third conversation, according to Smith, Danielle described that "it was basically a sexual assault where she was just to the point of almost letting him do whatever because she was so tired of screaming and fighting and nobody came to her help, that type of thing."

¶28 Smith testified that he told Hannon about these conversations only after all of them occurred because Hannon was in jail when the first conversation occurred and he felt it was necessary to talk to Hannon personally before telling anyone else. Hannon later told Smith that he had told his lawyer about these conversations and his lawyer was supposed to contact Smith, but no one contacted Smith. Smith did not go to the police because he thought it would be best to talk to the lawyer.

¶29 At the ***Machner*** hearing, defense counsel acknowledged that Hannon gave him the name of a bartender who had had conversations with Danielle and he did not have that person interviewed. He recalls that he and Hannon discussed Smith[5] on two different occasions. In the first conversation, Hannon told counsel "there was talk on the street" that Danielle "was hanging out in the bar and talking about what happened on the night in question"; he was certain there were "more specifics." In a second conversation, after Hannon was released from custody, he told counsel that Danielle's accounts to Smith had varied. Defense counsel initially testified that he "[couldn't] say there was a strategic reason" for not interviewing this person. Later defense counsel testified that he made a decision not to pursue anything further with Smith because, although he was told Danielle gave different accounts to Smith, "the information provided to [counsel] regarding [Smith] was never a recitation that there was not a sexual assault. The details, at least as [he] understood them, said yes, she was in … the apartment; yes, there was sexual contact; and no, it wasn't consented to." When shown Smith's affidavit regarding his three conversations with Danielle,

[5] Although defense counsel did not recall the name of the person, he testified he could not say it was not Smith. The circuit court and the State both assumed it was Smith.

defense counsel stated that he was told there were varying recitations, that he could not say specifically what in the paragraphs he was told but, "generally," that was "the kind of information [he] was provided."

¶30 Hannon argues that defense counsel was deficient for not interviewing Smith and, had he done so, he would have been able to impeach Danielle with her inconsistent versions and could also have argued that the first version was substantive evidence that the encounter had been consensual and supported Hannon's statement to the police.

¶31 In evaluating defense counsel's decision not to interview Smith, we must know what Hannon told defense counsel about the information Smith could provide. *See* ***Strickland***, 466 U.S. at 689-91. On this point, defense counsel testified that he understood Danielle's accounts to Smith to be that "yes, there was sexual contact; and no, it wasn't consented to." To the extent there was any ambiguity because of defense counsel's acknowledgement that he was "generally" given "the kind of information" in Smith's affidavit, we are satisfied the court implicitly resolved the ambiguity by finding that Hannon did not tell defense counsel that Danielle told Smith in one account that the sexual contact that occurred was consensual. The court concluded that Hannon received "competent, thorough and professional representation" and "reasonable, professional assistance." It is necessarily implicit in this conclusion that it credited defense counsel's testimony that, while Hannon told him Danielle gave Smith different accounts of what occurred, Hannon did not tell him that in one account Danielle said the sexual contact was consensual. When a circuit court does not make an express finding of fact, we may assume on appeal that it implicitly made the finding that supports its decision and we accept that finding if it is not clearly

erroneous. ***State v. Gruen***, 218 Wis. 2d 581, 597-98, 582 N.W.2d 728 (Ct. App. 1998).

¶32 Our conclusion that the court implicitly credited defense counsel's testimony that he was not told that, in one account to Smith, Danielle said the sexual contact was consensual, is re-enforced by the court's summary of Smith's testimony. The court focuses on a number of reasons, supported by the record, why one might doubt the credibility of Smith's accounts of Danielle's statements that are favorable to Hannon, including the credibility of Smith's attributing the word "cuddling" to Danielle.[6]

¶33 We conclude the record supports the court's implicit factual finding that defense counsel was not told that Danielle had told Smith the sexual contact with Hannon was consensual. We therefore turn to an examination of counsel's decision not to interview Smith in light of the information counsel acknowledges he was given: that Danielle had told Smith various accounts of nonconsensual sexual contact. Although counsel initially testified he did not have a strategic reason for not interviewing Smith, his later explanation, in essence, was that the various accounts involved nonconsensual sexual contact and the defense was consent. The inquiry, therefore, is whether it was reasonable not to pursue Smith as an additional source for impeaching details of Danielle's story, given that any inconsistent accounts would still involve nonconsensual sexual contact.

[6] The State refers to the circuit court's findings that relate to Smith's credibility in the context of arguing that Hannon was not prejudiced by Smith not testifying. Hannon argues in reply that it was prejudicial not to present Smith's testimony to the jury even if there were grounds for questioning his credibility. We refer in paragraph 32 above to the circuit court's assessment of Smith's credibility as it bears on the court's implicit finding that Hannon did not tell defense counsel that one account Danielle gave Smith was that only consensual sexual contact occurred.

¶34 Given the strong presumption of reasonableness that we are to accord counsel, we conclude this was a reasonable decision. Defense counsel decided upon a number of avenues for impeaching and discrediting Danielle's account of what occurred, using her statement to police, her testimony from the preliminary hearing and the administrative hearing, and the prior testimony and statements of witnesses who were in the apartment that night. A reasonable attorney in the same circumstances could conclude that the impeachment value of accounts from a friend of Hannon's that Danielle gave weeks later, all of which, as counsel understood, involved nonconsensual sexual contact, would not significantly add to the strength of the consent defense.

CONCLUSION

¶35 Because defense counsel acted reasonably, given the circumstances at the time, in deciding not to interview Wirth, Jajtner, and Smith, we conclude that conduct did not constitute deficient performance. Hannon, therefore, did not receive ineffective assistance of counsel. Accordingly, we affirm the judgment of conviction and the order denying his postconviction motion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.