COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP92-CR **Cir. Ct. No. 2005CF3533**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN A. SANCHEZ-TORRES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and M. JOSEPH DONALD, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Juan A. Sanchez-Torres appeals from a judgment of conviction for two counts of first-degree sexual assault of a child, two counts of

causing a child to view sexual activity, and one count of battery, contrary to WIS. STAT. §§ 948.02(1), 948.055(1) and 940.19(1) (2005-06).[1] He also appeals from an order denying his postconviction motion for a new trial based on ineffective assistance of counsel. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 On June 25, 2005, the State charged Sanchez-Torres with two counts of first-degree sexual assault of two male relatives, Jesus and Antonio, both of whom were under the age of thirteen at the time of the assaults. At the preliminary hearing, Antonio testified that he had been sexually assaulted by Sanchez-Torres, and that he had observed Sanchez-Torres sexually assault Jesus. Specifically, he testified there had been sexual contact between Sanchez-Torres and the boys (Sanchez-Torres touching the boys' penises).

¶3 Later, an amended information alleging additional charges was filed and the case proceeded to trial. At trial, both Antonio and Jesus testified at length about their sexual contact with Sanchez-Torres. They testified that over a period of about two years, they regularly visited Sanchez-Torres and spent the night, with all three sleeping in the same bed. They both testified that on numerous occasions

[1] The crimes at issue took place between June 2003 and June 2005, prior to the amendment of WIS. STAT. § 948.02(1) in 2006. *See* 2005 Wis. Act 430 & 2005 Wis. Act 437. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Sanchez-Torres was also convicted of two counts of repeated first-degree sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(a) (2005-06). In his postconviction motion, Sanchez-Torres moved to dismiss those two counts because § 948.025(3) prohibits the State from charging a defendant with both a violation of § 948.025(1) and WIS. STAT. § 948.02 (2005-06) for acts occurring during the same time period. The State agreed, and the postconviction court, the Honorable M. Joseph Donald, granted that part of the motion. Those two counts have been dismissed, are not at issue on appeal and will not be addressed.

Sanchez-Torres touched their penises and anal areas with his hands and penis, and made them touch Sanchez-Torres's penis. Each boy also testified that he saw Sanchez-Torres inappropriately touch the other boy.

¶4 Both boys were thoroughly cross-examined by the defense, with questions about to whom and when they reported the alleged abuse, whether they suffered physical abuse (specifically concerning allegations that Sanchez-Torres pinched Jesus' penis), and why their testimony varied from statements given to a police officer.

¶5 The State also called as witnesses two relatives, the boys' uncle and grandmother, who described negative behaviors the boys were exhibiting that ultimately led to the boys telling the relatives about the abuse. Another relative, Jesus' mother, was called to testify that Jesus' grandmother frequently took Jesus to the doctor when the mother was working.

¶6 Jesus' grandmother testified that she took Jesus to the doctor to have him examined after being told about the alleged abuse. She testified that the doctor told her that Jesus had been abused, but that there was no evidence of what might have been done to him. The fact the grandmother had taken Jesus for an examination concerning the abuse was unknown to the State and the defense until the trial, as the grandmother had never told the police officer or prosecutor. While the trial was in recess, the parties procured the doctor's report concerning the

visit.[2] Ultimately, the parties agreed to a stipulation pursuant to which the trial court read the following statement to the jury:

> On September 8, 2005, Jesus … went to Waukesha Pediatric Associates, Ltd., and saw Dr. Gerald Deutch. [Jesus] told Dr. Deutch that he, [Jesus], did not feel safe and that he had a history of sexual abuse for the past two years by penile and anal means of sexual abuse.
>
> [Jesus] indicated he was uncomfortable talking about the topic. The doctor noted no bruises or scars to [Jesus'] genitourinary area.
>
> A grandparent for [Jesus] called the clinic on September 19, 2005, to inquire if the doctor found evidence of molestation. No evidence of molestation was found. Normal examination findings, that would be no physical evidence found, does not rule out the possibility of sexual abuse and normal examination findings are seen in the majority of cases.

¶7 The State called one additional witness, City of West Milwaukee Police Department Sergeant Michael Dooley, who interviewed both boys when the abuse was reported. He testified about what the boys told him, and was asked both on direct and cross-examination about how the boys' statements varied from their trial testimony.

¶8 Finally, the State introduced at trial Antonio's testimony from the preliminary hearing. An attorney from the State read the testimony Antonio gave, while the lead prosecutor read the questions from the State, the defense and the court commissioner. When the State sought the court's permission to read the transcript, Sanchez-Torres objected, but was overruled. Specifically, the State

[2] According to Sanchez-Torres, neither the State nor trial counsel ever personally spoke with the doctor. However, trial counsel told postconviction counsel that he believed the State had spoken with the doctor.

sought to introduce Antonio's statements pursuant to WIS. STAT. § 908.01(4)(a)2., as consistent statements offered to "rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *See* ***id.*** The State indicated that it believed the consistent statements would be admissible in response to the anticipated testimony the defense would elicit from Dooley. In response, trial counsel stated: "[The State] approached me about that before we went on the record. It's my position to object to that. It's my position that I simply think they could call the witness and ask questions rather than introduce a transcript."[3] The State explained its reasons for seeking the reading, and then the trial court asked trial counsel why the transcript should not be read to the jury. The following exchange took place:

> [Counsel]: Well, I am going to, just for the record, object. I will let the Court make a ruling, Your Honor.
>
> THE COURT: You are not willing to help me with this ruling?
>
> [Counsel]: No, sir.
>
> THE COURT: Other than to say [the State] is probably correct on the law?
>
> [Counsel]: Right. But I do not formally want to stipulate or agree.

Following this exchange, the trial court ruled that the transcript testimony was admissible under WIS. STAT. § 908.01(4)(a)2. and could be read to the jury.[4]

[3] It is not clear from the transcript whether trial counsel was objecting to the admission of Antonio's statements from the preliminary hearing, or to the method of introduction—reading the preliminary hearing transcript instead of asking Antonio or Sergeant Dooley questions about Antonio's previous statements.

[4] Whether the prior consistent statements were properly admitted under WIS. STAT. § 908.01(4)(a)2. is not an issue this court need decide. Rather, as explained *infra*, we assume for (continued)

¶9 The defense called only one witness: Sanchez-Torres. He categorically denied having assaulted the boys. He said that he always slept on the couch when they stayed overnight. Further, he testified that the first time he ever heard that the boys told someone Sanchez-Torres had molested them, he thought it was a joke. He said that his adult nephew called him on the phone to tell him, and Sanchez-Torres heard both the nephew and Sanchez-Torres's brother laughing during the call, which led Sanchez-Torres to think it was all a joke. Finally, he testified that he did not know of any reason the boys might make up the accusations against him.

¶10 The jury found Sanchez-Torres guilty of all charges. On count one, first-degree sexual assault of a child, he was sentenced to ten years of initial confinement and twenty years of extended supervision. The court imposed less time on the other counts, to run concurrent to the first count.

¶11 Sanchez-Torres filed a motion for postconviction relief, seeking a new trial on all counts on grounds that he was denied the effective assistance of counsel.[5] He alleged eleven specific instances of ineffective assistance, only three of which he pursues on appeal, as discussed below. The trial court denied the

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purposes of this opinion that the evidence should not have been admitted and that trial counsel should have more fully supported his objection.

[5] Sanchez-Torres also moved to amend the judgment of conviction for the two counts of causing a child to view sexual activity, to reflect a Class H felony, rather than a Class F felony, because the jury was instructed on the age element pertaining to Class H felonies. This part of the motion was granted. On its own initiative, the postconviction court also commuted the sentences for those two crimes to nine months in the House of Corrections. Sanchez-Torres does not object to the postconviction court's actions and those counts will not be addressed further on appeal.

motion without a hearing, adopting the State's arguments on the ineffective assistance of counsel issue *in toto*. This appeal follows.

DISCUSSION

¶12 Sanchez-Torres argues he is entitled to a new trial because he was denied the effective assistance of trial counsel. Specifically, he alleges trial counsel was ineffective because he: (1) failed to properly object to the introduction of the preliminary hearing testimony; (2) failed to object to Sergeant Dooley's testimony concerning what the boys told him when he first interviewed them; and (3) stipulated to an inaccurate statement of facts concerning statements made to Jesus' doctor. He argues that these errors individually and cumulatively entitle him to a new trial.

I. Legal standards.

¶13 To establish a claim of ineffective assistance of counsel, the defendant must demonstrate that: (1) defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not consider both prongs of this test if the defendant has made an insufficient showing on either one. ***Id.*** at 697.

¶14 With respect to the prejudice prong, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "[I]n determining whether a defendant has been prejudiced as result of counsel's deficient performance, [a court] may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under ***Strickland***." ***Thiel***, 264 Wis. 2d 571, ¶60.

¶15 Ineffective assistance of counsel claims present mixed questions of law and fact. ***Id.***, ¶21. "This court will uphold the [trial] court's findings of fact unless they are clearly erroneous," but "[w]hether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo." ***Id.*** (citations omitted).

II. Analysis.

¶16 Sanchez-Torres has alleged that trial counsel was deficient in several ways, and that these errors were prejudicial when considered both individually and cumulatively. We conclude that counsel's alleged errors were not constitutionally prejudicial, considered both individually and cumulatively.

A. Failure to support the objection to the preliminary hearing testimony.

¶17 The first claimed deficiency was trial counsel's failure to support his objection to the introduction of the preliminary hearing testimony, which comprised eight pages of the trial transcript. As a result, the jury heard Antonio's preliminary hearing testimony about the abuse, which repeated some parts of his trial testimony but also differed from his trial testimony in some respects. For

example, as trial counsel pointed out in closing, Antonio testified at one point in the preliminary hearing that he saw Sanchez-Torres touch Jesus "three or two" times and could not remember when the events happened. However, at trial, Antonio said that he and Jesus were abused almost every time they went to Sanchez-Torres's home, and that they went there every Friday for about two years.

¶18 Sanchez-Torres argues that the "dramatic reading"[6] of the preliminary hearing testimony "bolstered" Antonio's testimony, and this undermined the reliability of the trial. He explains: "[I]n essence, the jury heard Antonio's consistent testimony accusing Sanchez-Torres of sexual assault against himself and [Jesus] twice, once through his live trial testimony and again through a dramatic reading of his preliminary hearing testimony." He acknowledges that trial counsel used discrepancies in the preliminary hearing testimony to argue Antonio was not credible, but asserts that did "not eradicate the prejudice from the admission of the consistent testimony" because "[t]he more often the jury heard these accusations repeated, the more … the jury was likely to believe [Antonio's] testimony over Sanchez-Torres'[s] testimony."

¶19 We disagree that the introduction of this testimony rendered the trial unreliable. *See* ***Strickland***, 466 U.S. at 687 (prejudice prong requires showing counsel's errors deprived the defendant of a trial with a reliable result). Antonio's preliminary hearing testimony was in numerous ways inconsistent with his trial testimony, a fact that trial counsel exploited in closing argument. The disputed

[6] Sanchez-Torres uses the term "dramatic reading" several times in his brief. It is unclear whether Sanchez-Torres is using this term to describe a live reading of the transcript, or whether Sanchez-Torres is implying that the reading included dramatic emphasis that was improper. We note that there are no indications in the record that the reading was embellished or dramatic, nor were there any objections to undue emphasis made during the reading.

evidence was as valuable to the defense as to the State with respect to Antonio's credibility. The testimony did not solely favor the State, and was in fact used effectively as part of the defense.

B. Failure to object to Sergeant Dooley's testimony.

¶20 The second claimed deficiency was trial counsel's failure to object to Sergeant Dooley's testimony concerning specific details Jesus and Antonio told him about the abuse. Sanchez-Torres notes that Dooley was allowed to testify without objection about his interview of Antonio and Jesus, and to read from a police report a portion of Jesus' statement to the police. Sanchez-Torres points out numerous consistencies between Dooley's testimony and the testimony of the boys, and also notes that Dooley's testimony added details that Jesus and Antonio did not testify to. Sanchez-Torres argues the testimony was prejudicial because it bolstered the boys' credibility by repeating the accusations of sexual assault and provided the jury with additional details of the alleged assaults.

¶21 The testimony concerning the boys' reports of abuse was cumulative, and it is not likely that without this testimony, the jury would have acquitted. *See* ***id.*** at 694 (prejudice prong requires showing of "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Before Dooley testified, the jury had already learned from the boys that they spoke with Dooley, and from trial counsel's questions on cross-examination that the boys' testimony was

inconsistent with Dooley's police report.[7] In short, Dooley's testimony provided little information not already known to the jury, and trial counsel was in fact able to effectively cross-examine the boys based on Dooley's testimony.

C. Stipulation concerning statements to the doctor.

¶22 Sanchez-Torres argues that the third claimed deficiency was trial counsel's decision to stipulate to what he calls "inaccurate facts" concerning Jesus' statement to his doctor. Specifically, he asserts that trial counsel should not have stipulated that Jesus told his doctor "that he did not feel safe and that he had a history of sexual abuse for the past two years by penile/anal means." This was error, Sanchez-Torres explains, because trial counsel did not speak to the doctor to investigate the visit and, it turns out, the stipulation was inaccurate. According to postconviction counsel, who spoke with the doctor, it was actually Jesus' grandmother who told the doctor that Jesus had been abused, and the doctor did not discuss any sexual allegations with Jesus.

¶23 We conclude it is unlikely that the jury would have acquitted if the jury had been informed that the statement to the doctor came from the grandmother as opposed to coming directly from Jesus. *See* ***id.*** The undisputed testimony was that the boys told their grandmother about the abuse, and the boys did not waiver from their claims that they were abused (although the specifics of that abuse varied, which, according to trial counsel's argument to the jury, was evidence that the boys were lying about the abuse). Whether the boys were lying

[7] For example, before Dooley even testified, trial counsel asked Antonio on cross-examination if he recalled telling Dooley that Sanchez-Torres ejaculated when Antonio's hand was on Sanchez-Torres's penis. When Antonio replied no, trial counsel asked: "So if the officer put that down, that's not what you told him, correct?" Antonio responded: "Correct."

to their grandmother, to the police and to the jury was the key issue at trial, as trial counsel noted in his closing, stating: "[I]t's a clear 'he said/he said' case…. [Sanchez-Torres] testified he didn't do these things. The two boys testified that he did…. [I]n essence, it's [Sanchez-Torres's] word against their word and that's what this case boils down to." This was not a case where Jesus recanted and his statement to the doctor was being used to prove that he had previously asserted he had been abused. The jury heard directly from Sanchez-Torres and both boys. The fact that the jury also erroneously heard that the doctor was told about the abuse directly by Jesus, rather than through Jesus' grandmother, does not render the trial proceedings unreliable. *See* ***id.*** at 687. Indeed, the introduction of the stipulation may have actually helped the defense, because it included the fact that the doctor had found no physical evidence of abuse.

D. Cumulative effect.

¶24 As a result of the three claimed errors, the jury was permitted to hear the boys' statements about the abuse through their direct testimony and, in addition, through testimony by Dooley and from the preliminary hearing. The jury also heard that Jesus told his doctor about the abuse. We conclude that in this case, where the information was already generally known to the jury and was helpful to the defense, and where trial counsel was able to cross-examine the boys about the abuse and their earlier inconsistent statements, these alleged errors, even considered cumulatively, do not satisfy the ***Strickland*** standard for a new trial based on prejudicial performance.

¶25 In summary, whether we consider the alleged errors individually or cumulatively, we conclude that Sanchez-Torres has not met his burden of proving

that he was prejudiced by counsel's performance. Therefore, we affirm both the judgment and the order denying his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.