COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP427-CR **Cir. Ct. No. 2004CF374**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. DAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. David A. Day appeals pro se from a judgment convicting him after a jury trial of two counts of first-degree sexual assault of a child, one count of exposing a child to harmful materials, and one count of child

enticement. He also appeals from an order denying his motion for postconviction relief. We affirm the judgment and the order.

¶2 In his postconviction motion and on appeal, Day contends that he was deprived of effective assistance of counsel at trial.[1] The trial court denied Day's postconviction motion after a hearing at which testimony was received from Day's trial counsel, as provided in ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶3 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's conduct is deficient if it falls below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. When reviewing counsel's performance, courts are required to be highly deferential and to avoid the distorting effects of hindsight. ***Id.***

¶4 To prove prejudice, "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.***, ¶20 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on the reliability of the proceedings. ***Thiel***, 264 Wis. 2d 571, ¶20.

[1] Day refers to deficient "pre-trial preparation," but all of the arguments briefed by him relate to alleged ineffective assistance of counsel at trial.

¶5 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** However, the ultimate determination of whether counsel's performance falls below the constitutional minimum for effective assistance of counsel presents a question of law. ***Id.*** This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. ***Thiel***, 264 Wis. 2d 571, ¶24.

¶6 In analyzing an ineffective assistance claim, we may choose to address either the deficient performance prong or the prejudice prong. ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. If we conclude that the defendant has made an inadequate showing with respect to one component, we need not address the other. ***Id.***

¶7 Applying these standards here, we conclude that the trial court properly rejected all of Day's claims. Day's convictions were based on testimony by L.K., indicating that on October 3, 2004, while at Day's residence, Day touched the penis of twelve-year-old L.K. and had L.K. touch his penis. L.K. also testified that Day showed him pornography on his computer, including a photograph labeled "12-year-old boy," depicting a nude boy with an erect penis. The evidence at trial indicated that Day was a long-standing friend of L.K.'s family.

¶8 In his postconviction motion and on appeal, Day challenges various aspects of his trial counsel's representation. We address his arguments seriatim.[2]

¶9 Day contends that his trial counsel rendered deficient performance by failing to impeach L.K. with alleged "inconsistent" testimony as to how much pubic hair Day has. Day argues that at the preliminary hearing, L.K. testified that Day had a lot of pubic hair, but at trial testified that he could not recall a significant amount of pubic hair on Day.

¶10 At trial, Day testified that he shaves his pubic region, and explained why. Prior to trial, he also took photographs of himself in jail to demonstrate that his pubic region was shaved. Day contends that his trial counsel was ineffective for failing to have taken the pictures himself to ensure the quality of the images, and for failing to introduce the photographic evidence at trial.

¶11 As determined by the trial court, Day's argument regarding trial counsel's failure to present photographic evidence lacks merit for multiple reasons. As noted by the trial court, the photographs taken by Day in jail were inconclusive because Day had ample time to change his appearance between the time of the assaults on October 3, 2004, and the time he photographed himself in jail two months later, or between the time of the assaults and his arrest on October 27, 2004. The trial court also noted that the photographs taken by Day were not

[2] In his statement of issues, Day raises an issue as to whether his trial counsel was ineffective for failing to file a motion to suppress evidence obtained when the police removed a computer from his home in October 2004. However, he does not address this issue in his brief, or present any argument concerning it. This court need not consider an argument which is not developed. ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999). We therefore decline to review this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

clearly demonstrative as to whether Day's pubic region was closely shaved or not, and that Day's contention that he shaved his pubic region was adequately presented in his own testimony, along with his explanation as to why he shaved himself.

¶12 The trial court's findings as to what the photographs show and their lack of probative value is supported by the record. The trial court was also correct in concluding that whether or not Day had pubic hair in December 2004 did not establish whether or not he had pubic hair on October 3, 2004. For this reason, it made no difference whether counsel or Day took the photographs in jail, and counsel did not render ineffective assistance by failing to introduce photographic evidence on this subject.

¶13 Day's contention that his trial counsel rendered ineffective assistance by failing to impeach L.K. by pointing out inconsistencies in his testimony also fails. At the preliminary hearing, L.K. was asked by Day's trial counsel if Day had "a lot of hair around his penis?" L.K. answered, "Yes." However, trial counsel then asked whether L.K. would "characterize it as kind of a big, bushy area," and, when L.K. indicated that he did not understand, asked him whether he had ever seen a person with "real thick, curly hair" on his head. L.K. indicated that he had seen people with such hair on their heads, but answered "no" when asked if this was what it was like around Day's penis.

¶14 At trial, Day's trial counsel asked L.K. if he saw a significant amount of hair around Day's penis, and L.K. stated that he did not remember. However, when trial counsel asked follow up questions as to whether Day had pubic hair around his penis when L.K. saw it on October 3, 2004, L.K. replied, "Yes." L.K. thus indicated at both the preliminary hearing and trial that Day had

hair around his penis, but clarified at the preliminary hearing that it was not thick and curly. Because the testimony was not clearly inconsistent, trial counsel did not render deficient performance by failing to impeach L.K. with it.

¶15 For similar reasons, the trial court properly rejected Day's claim that his trial counsel was ineffective for failing to present additional evidence and argument regarding a blood pressure cuff allegedly used during the sexual assaults. At trial, L.K. testified that when he was at Day's residence on October 3, 2004, Day had a blood pressure cuff on his bed and took L.K.'s blood pressure on his arm and thigh after having L.K. run up and down the stairs. L.K. testified that Day also removed his own clothing and put the blood pressure cuff on his bare upper thigh. L.K. testified that Day began masturbating, and then took L.K.'s hand and placed it on his penis.

¶16 On appeal, Day argues that his trial counsel rendered ineffective assistance by failing to introduce into evidence the actual blood pressure cuff owned by him.[3] However, Day did not raise this issue in his postconviction motion, and his trial counsel was not questioned regarding it. Day therefore waived the issue for purposes of appeal. *See* ***State v. Lipke***, 186 Wis. 2d 358, 369 n.3, 521 N.W.2d 444 (Ct. App. 1984) (court will not consider issues raised for the first time on appeal); ***Machner***, 92 Wis. 2d at 804 (preserving the testimony of

[3] At trial, defense counsel showed L.K. a blood pressure cuff that counsel had purchased, and L.K. testified that it was similar to the one Day had used. Although the jury saw the blood pressure cuff when defense counsel showed it to L.K., and heard L.K. testify that it was similar to the one Day had, the trial court denied defense counsel's request to admit this cuff into evidence, relying on the lack of evidence that it was the blood pressure cuff used by Day. On appeal, Day contends that when the police searched his home, they did not find his blood pressure cuff, which was hidden. He states that he subsequently told his trial counsel where it was, and his brother and trial counsel retrieved it, but counsel did not introduce it at trial.

counsel is a prerequisite to raising a claim of ineffective assistance of counsel on appeal).

¶17 Day also contends that his trial counsel was ineffective for not arguing in closing argument that L.K.'s testimony was incredible because the blood pressure cuff would not have fit around Day's thigh. In support of this argument, Day relies on L.K.'s estimation of the length of the blood pressure cuff at the preliminary hearing, wherein he indicated with his hands that the cuff was about sixteen inches long.[4] This testimony was presented to the jury during cross-examination of L.K. at trial. In addition, although Day never admitted that he used a blood pressure cuff on L.K. when he testified at trial, during his testimony Day measured the upper part of his thigh while wearing pants, and testified that the circumference of his thigh was between twenty-one and one-half and twenty-two inches. Day also testified that he had worked as a volunteer firefighter, ambulance driver, and first responder for many years, and had never seen a blood pressure cuff that was big enough to go around a man's thigh.

¶18 At the postconviction hearing, Day's trial counsel testified that he meant to discuss the length of the blood pressure cuff and the measurement of Day's thigh during closing argument, but forgot to do so. However, as determined by the trial court, counsel's failure to address these matters does not undermine confidence in the reliability of the proceedings. L.K.'s testimony at the preliminary hearing was merely an estimate of the length of the blood pressure cuff used by Day, made two months after the event. Nothing in the evidence

[4] At the preliminary hearing, a tape measure was used to measure the distance between L.K.'s hands.

established the length of the blood pressure cuff actually owned by Day, or that all cuffs are a standard size. Moreover, Day measured the circumference of his thigh over his clothing, unlike the situation at the time of the assaults, when his thigh was bare. Day's measurement also occurred nearly eleven months after the alleged assaults. There was therefore nothing in the record that established that the blood pressure cuff owned by Day could not have fit around his thigh at the time of the assaults.

¶19 In addition, as noted by the trial court, the jurors heard the evidence regarding L.K.'s estimate and Day's measurement at trial, and were free to consider it. If Day's counsel had addressed the matter in closing argument, his argument could have indicated nothing more than that, eleven months after the alleged assaults, Day's clothed thigh was larger than the cuff as estimated by L.K. two months after the incident. Because additional closing argument on the subject would have added nothing of significance to Day's defense, trial counsel's failure to address the matter does not undermine confidence in the outcome of the proceeding and was not prejudicial.

¶20 Day's next argument is that his trial counsel was ineffective for failing to object to two portions of the testimony of L.K.'s father. When asked to describe how he learned of the assaults from L.K., L.K.'s father stated:

> He was acting pretty reserved and um --- I walked into his bedroom and I sat on the bed and I said well, asked him what's wrong. Didn't say much. Um – it came out, which I don't know how I can explain it without explaining the other half of it.

¶21 Day contends that this response conveyed to the jury that he had been engaged in sexual activity with L.K.'s brother or other siblings, despite the trial court's pretrial ruling excluding evidence of allegations involving victims

other than L.K. The trial court properly rejected Day's argument, concluding that the reference by L.K.'s father to "the other half of it" did not convey that there were other sexual assault allegations, or allegations involving L.K.'s brother. This is particularly true when the response is read in context. Immediately after L.K.'s father's response, the prosecutor asked, "But what came out?" L.K.'s father replied, "That David had—was—touched him." The prosecutor then asked, "Touched [L.K.]?" and his father replied, "Yes." Nothing in this colloquy indicated to the jury that L.K.'s father was referring to the sexual assault of an additional victim by Day. Trial counsel therefore had no reason to object to it.

¶22 Day also contends that his trial counsel should have objected when, in response to being asked whether he believed Day was responsible for L.K.'s lack of confidence or other issues, L.K.'s father replied, "I think after the—after what happened to my kids, [L.], it sure made a lot more sense." As determined by the trial court, L.K.'s father immediately clarified that he was speaking about L.K. The ensuing questions and answers were about L.K., and there was no reference to a sexual assault of any of L.K.'s siblings. Under these circumstances, there was no reason to believe that the jury would have understood the reference to "kids" as anything other than a slip of the tongue. The trial court therefore correctly

determined that trial counsel's failure to object was neither deficient nor prejudicial.[5]

¶23 Day also argues that his trial counsel rendered ineffective assistance when he failed to object to a portion of the prosecutor's closing argument, in which she stated:

> In fact, the reason I did not have Detective Joers testify is because [L.K.'s] testimony was so powerful. It was so clear on its face I didn't need to artificially bolster it by saying oh, by the way, Ladies and Gentlemen, look, he said the same thing to her that he told you. Because I knew that that would be the case. I knew that [L.K.'s] statement would be consistent. Why? Because [L.K.] is telling the truth.

¶24 Day argues that his trial counsel should have objected because the prosecutor's comment bolstered the credibility of Detective Marie Joers, referred to by Day as a "non-speaking witness." In fact, Joers testified as a witness called by the defense. In her testimony, Joers related what L.K. told her about the assaults. Therefore, the prosecutor's closing argument was not telling the jury what a witness who had not testified would have said in testimony. Instead, the prosecutor was telling the jury why she had not called Joers as a witness,

[5] In his postconviction motion and his brief on appeal, Day also contends that his trial counsel rendered ineffective assistance when he failed to make an offer of proof after the trial court sustained an objection to counsel's cross-examination of L.K.'s father, in which counsel questioned whether L.K.'s father had made a threat against Day after he was arrested and jailed. Day contends that an offer of proof would have established that after he was jailed, L.K.'s father told Day's brother that if Day was released from jail, L.K.'s father would hunt him down and kill him. In concluding that this issue did not demonstrate ineffective assistance of counsel, the trial court noted that the testimony of L.K.'s father dealt with how the allegations against Day were first disclosed. The trial court noted that it was clear to the jury that L.K.'s father harbored adverse feelings toward Day. The trial court also reasonably concluded that whether L.K.'s father made a threat after his discovery of the assault and Day's arrest would not be particularly probative as to the credibility of his testimony. Under these circumstances, it correctly concluded that Day's trial counsel did not render ineffective assistance by failing to pursue the issue.

explaining that she did not need to bolster L.K.'s testimony and credibility by having Joers testify. When the prosecutor said that she knew L.K. "said the same thing" to Joers, and that his statement "would be consistent," she was not speculating about how Joers would have testified. She was instead arguing that L.K.'s statements to Joers, as testified to by Joers, were consistent with his testimony at trial. Because this was a permissible argument based upon the evidence, trial counsel's failure to object was neither deficient nor prejudicial.

¶25 On appeal, Day also contends that his trial counsel rendered ineffective assistance by failing to adequately argue against the admission of other acts evidence. Over counsel's objection, evidence was admitted at trial indicating that Day had touched L.K.'s penis on two occasions before October 3, 2004. Both incidents occurred while L.K. was alone with Day at Day's cabin in Price County. According to L.K.'s testimony, one incident occurred on or about September 1, 2001, and the other occurred on or about July 4, 2004. L.K. testified that in both instances, Day told him to take a shower after he helped work on Day's property. He testified that in the second instance, Day took a shower with him, stating that the cabin was short of water. L.K. testified that in both instances, Day personally washed L.K.'s penis.[6]

¶26 "[E]vidence 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." WIS. STAT. § 904.04(2)(a) (2007-08).[7] However, other

[6] Day denied that L.K. showered at his cabin or that he touched L.K.'s penis.

[7] Except as otherwise noted, all references to the Wisconsin Statutes are to the 2007-08 version.

acts evidence may be admitted when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.***

¶27 The admission of other acts evidence must be evaluated under the three-step analysis discussed in ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The trial court must consider: (1) whether the evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ***Sullivan***, 216 Wis. 2d at 772-73. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Id.*** at 789-90. "The inquiry is not whether the other acts evidence is prejudicial but whether it is *unfairly* prejudicial." ***State v. Gray***, 225 Wis. 2d 39, 64, 590 N.W.2d 918 (1999).

¶28 A trial court's decision to admit other acts evidence involves the exercise of discretion, and will not be disturbed absent an erroneous exercise of discretion. ***State v. Hammer***, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d 629. If discretion was exercised in accordance with accepted legal standards and the facts of record, and if there was a reasonable basis for the trial court's determination, we will uphold the trial court's decision. ***Id.*** "[I]n sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes

was properly admitted at trial." ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606.

¶29 The trial court properly exercised its discretion in admitting evidence regarding the Price County incidents, concluding that it was relevant to whether Day's alleged touching of L.K. on October 3, 2004, was for the purpose of sexual gratification, and to establish Day's motive in touching L.K. It concluded that the probative value of the other acts evidence substantially outweighed any danger of unfair prejudice. In reaching this conclusion, it noted that the other acts involved L.K. and that the evidence was being presented only through L.K.'s testimony, and thus did not involve bringing in other witnesses to bolster L.K.'s credibility. Consistent with these determinations, it instructed the jurors at trial that if they found that the other acts occurred, they should consider those acts only in evaluating Day's motive, intent, plan or preparation, and the absence of mistake or accident.

¶30 The probative value of other acts evidence depends on the similarity between the charged offense and the other acts. ***Gray***, 225 Wis. 2d at 58. Similarity is demonstrated by nearness in time, place and circumstance between the charged crime and the other acts. ***State v. Scheidell***, 227 Wis. 2d 285, 305, 595 N.W.2d 661 (1999).

¶31 An issue at trial was whether, on October 3, 2004, Day touched L.K.'s penis and had L.K. touch his penis for the purpose of sexual gratification. *See* WIS. STAT. §§ 948.01(5)(a) and 948.02(1) (2003-04). Evidence that Day touched L.K.'s penis on two earlier occasions while alone with him and after inducing him to shower at his cabin was relevant to whether he touched L.K.'s penis for the purpose of sexual gratification while alone with him at his residence

on October 3, 2004. It was also relevant to assist the jury in evaluating Day's conduct in this case, which Day alleged was motivated by the benevolent goal of teaching L.K. about masturbation. Evidence that Day touched L.K.'s penis on two earlier occasions while purporting to provide assistance to him was relevant and probative as to whether Day's intent and purpose in this case was to assist L.K., or to sexually gratify himself.

¶32 We also reject Day's argument that the incidents in September 2001 and July 2004 were too remote in time to be probative. Other acts evidence has been admitted even after the lapse of ten years. *See, e.g.*, ***State v. Plymesser***, 172 Wis. 2d 583, 596, 493 N.W.2d 367 (1992) (thirteen-year-old evidence); ***State v. Kuntz***, 160 Wis. 2d 722, 747-48, 467 N.W.2d 531 (1991) (sixteen-year-old evidence). The passage of three years since the September 2001 incident, and three months since the July 2004 incident, therefore did not render Day's conduct at his cabin too remote in time to be probative, particularly since it involved the same victim.

¶33 The trial court also gave appropriate cautionary instructions, limiting the jury's use of the other acts evidence to proper purposes. Such cautionary instructions eliminate or minimize the potential for unfair prejudice. ***Hammer***, 236 Wis. 2d 686, ¶36. Because the other acts evidence was therefore properly admitted, no basis exists to conclude that Day's trial counsel rendered ineffective assistance by failing to adequately argue against the admission of the evidence.

¶34 In his final ineffective assistance argument, Day contends that his trial counsel was deficient for failing to argue that the evidence was insufficient to convict him of exposing a child to harmful material in violation of WIS. STAT. § 948.11(2)(a). In support of this argument, Day contends that the article on

masturbation that he showed L.K. was educational, not harmful within the meaning of the statute.

¶35 An attorney's failure to pursue a meritless motion does not constitute deficient representation. ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). A motion alleging that the evidence was insufficient would have lacked merit because Day's conviction for exposing a child to harmful materials was premised on the evidence that he showed L.K. a photograph labeled "12-year-old boy," depicting a nude boy with an erect penis, not on the computer article. The photograph was introduced into evidence at trial, and L.K. identified it as the photograph Day showed him. L.K. testified that Day got it out of a "My Pictures" folder on his computer, after directing L.K. to the computer article on masturbation.

¶36 The prosecutor's opening statements and closing arguments made clear that this photograph, which constituted State's Exhibit 1 at trial, formed the basis for the charge of exposing a child to harmful material. In its instructions to the jury, the trial court informed the jury that "'[h]armful material'" means pictures of a person or portion of the human body that depicts nudity or sexually explicit conduct and that is harmful to children." Because it was the photograph, not the article, that formed the basis for Day's conviction, his argument about the alleged lack of harmfulness of the article provides no basis for relief on appeal.

¶37 In his appellant's brief, Day also argues that he is entitled to a new trial in the interest of justice. He premises this claim on the same arguments that underlie his claim of ineffective assistance of counsel. For the reasons already provided in rejecting those arguments, no basis exists to order a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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