COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2955-CR **Cir. Ct. No. 2005CF194**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD E. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Todd E. Peterson appeals a judgment convicting him of first-degree sexual assault of a child as a persistent repeater and an order denying his motion for postconviction relief. He contends he merits a new trial

because trial counsel was ineffective and because the trial court improperly admitted "other-acts" evidence of his prior assaults on young girls. We disagree, and affirm the judgment and order.

¶2 Peterson was charged, as a persistent repeater, with sexually assaulting Michael W., the then eight-year-old son of a friend. A jury found Peterson guilty of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1) (2007-08).[1] The court sentenced him to life imprisonment without the possibility of extended supervision. *See* WIS. STAT. § 939.62(2m)(b)2.

¶3 Attorney Leonard Kachinsky was Peterson's trial counsel. Postconviction, Peterson retained Kachinsky's former law partner, Attorney Gregory Petit. Peterson, through Petit, filed a motion for a new trial based in part on a claim that Kachinsky rendered ineffective assistance of counsel. On its own initiative, the trial court disqualified Petit because his partnership with Kachinsky had ended bitterly. The public defender's office appointed postconviction counsel, who continued with the motion Petit filed. After a ***Machner***[2] hearing, the court denied Peterson's motion for a new trial, and Peterson appealed. Without reaching the merits, this court reversed on the grounds that the trial court erred in disqualifying Petit without giving weight, on the record, to Peterson's right to be represented by counsel of his choice, and remanded the matter for a new postconviction motion hearing. Again represented by Petit, Peterson opted to proceed on the postconviction record appointed counsel had established and filed a new notice of appeal from the 2006 judgment of conviction and the 2007

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

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

postconviction order. Additional facts taken from trial and ***Machner*** hearing testimony will be supplied as needed.

¶4 Peterson contends Kachinsky rendered ineffective assistance in a host of ways. He asserts Kachinsky failed to adequately cross-examine or impeach certain witnesses; explain the benefits of a continuance when a newly discovered "other acts" victim surfaced; keep him informed and negotiate for him; and challenge the charging period. The claim we deem to be the primary one is Peterson's contention that Kachinsky should have moved to suppress his inculpatory statement to a woman who was, by profession, a sheriff's deputy. Peterson argues that, although she was off-duty and out of uniform, she nonetheless was acting as an agent of the State. We begin there.

¶5 To prove ineffective assistance of counsel, a criminal defendant must show: (1) deficient performance by his or her lawyer and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove constitutional deficiency, the defendant must establish that counsel's conduct was objectively unreasonable. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove constitutional prejudice, the defendant must establish a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. ***Id.*** A "reasonable probability" is one sufficient to undermine confidence in the outcome. ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305. The inquiry focuses not on the outcome of the trial, but on the reliability of the proceedings. ***Id.*** If the defendant fails to establish either prong, we may omit the inquiry into the other. ***State v. Wery***, 2007 WI App 169, ¶8, 304 Wis. 2d 355, 737 N.W.2d 66, *review denied*, 2007 WI 134, 305 Wis. 2d 129, 742 N.W.2d 526.

¶6 Michael first disclosed the assault to two neighborhood friends in September 2004, over a year after it occurred. Peterson was outside of Michael's house moving appliances for Michael's mother. Michael saw Peterson and told his friends and sister about the incident.

¶7 Trisha Liethen, the sheriff's deputy, also was at Michael's home that day. She was the "big sister" to another of Michael's sisters through the Big Brothers Big Sisters program. Liethen was not in uniform or on duty; due to a work-related injury, she was in the process of going on disability retirement. Liethen had been a big sister for several years, knew Peterson from seeing him at the house and called "hi" to him when she saw him. Soon after, she overheard the children talking about the assault, so she took Michael aside. He began crying and told her what happened when he spent the night at Peterson's house "around his birthday," which is in June. Liethen asked Peterson about Michael's accusation. Peterson said something to the effect of "that wasn't when it happened," but did not deny the allegation. Liethen told Peterson she was going to call the police, and he should not leave. She went into the house and left him standing outside on the porch. Liethen called Michael's mother to come home from work and waited with her for the police to arrive.

¶8 Peterson testified at the postconviction ***Machner*** hearing that he had known Liethen for about two years at the time of Michael's disclosure. He knew she was a sheriff's deputy and about her disability and testified she was not in uniform and that he knew she was there in her capacity as a big sister. Peterson also testified that after Liethen spoke to him he "wanted to confront Michael." He said Liethen grabbed his elbow and told him he "can't go nowhere" until the police came, making him feel as if he were "being forced to stick around." Liethen denied touching him in any fashion.

¶9 Peterson argues that Kachinsky should have moved to suppress his statement to Liethen because it was the product of custodial interrogation and so should have been preceded by ***Miranda***[3] warnings. He contends the statement's admission was particularly damaging because it "left the jury with the unchallenged opinion" that he confessed to the assault.[4] Kachinsky testified that he concluded a suppression motion would not have been fruitful because he saw no basis to deem Liethen a state actor.

¶10 ***Miranda*** warnings are required only for custodial interrogation. *See* ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). Thus, assuming for argument's sake that Liethen "questioned" Peterson, ***Miranda*** advisements would have been required only if Liethen was a law enforcement officer and if Peterson was in custody.

¶11 This court recently has addressed in a Fourth Amendment context whether an off-duty officer's actions in a private capacity constituted State or private action. In ***State v. Cole***, 2008 WI App 178, ¶¶5, 13, ___ Wis. 2d ___, 762 N.W.2d 711, an off-duty police officer opened a letter delivered to her home address. It bore her address but someone else's name. ***Id.***, ¶5. The contents suggested criminal activity and she turned the letter over to the district attorney.

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[3] See ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[4] The statement was not unchallenged. Peterson's statement to the police denying the assault was read to the jury and made an exhibit. That statement said, "I did not have any sexual contact with Mike while he was at my home. I do not wish to sign this statement."

Id., ¶14. Examining whether her reading of the letter constituted a government or a private search, we said that government involvement in a search is not measured by the actor's primary occupation, but by the capacity in which he or she acts at the time in question. ***Id.***, ¶13 (citations omitted). Considering the totality of the circumstances, we concluded that the activity the officer was engaged in—opening and reading mail delivered to her home—was that of a private citizen and thus did not implicate the Fourth Amendment. ***Id.***, ¶¶19, 22.

¶12 Despite the somewhat different context, we find that reasoning persuasive in the circumstances here and conclude Liethen was acting as a private citizen. She was present in her role as big sister. Upon learning what Michael divulged, Liethen responded as any responsible adult might. She spoke privately to Peterson and Michael, contacted Michael's mother and waited with her for the police to arrive. She filed no report and engaged in no official follow-up.

¶13 We also examine the totality of the circumstances to assess whether Peterson was in custody for purposes of ***Miranda***. *See* ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). We ask whether he "suffered a restraint on freedom of movement of the degree associated with a formal arrest." *See* ***State v. Goetz***, 2001 WI App 294, ¶11, 249 Wis. 2d 380, 638 N.W.2d 386 (citation omitted). The test is how a reasonable person in that position would have understood the situation. ***Morgan***, 254 Wis. 2d 602, ¶10.

¶14 Despite testifying that subjectively he felt like he was "being forced to stick around," objectively, there was no restraint on Peterson's freedom. Liethen was not in uniform; indeed, more than simply off-duty, she was in the process of terminating her employment. Liethen did not reference her position as a sheriff's deputy or make any show of official authority. Liethen simply told him

not to leave and left him standing on the porch while she went inside to call the police. A reasonable person would not have understood that situation to be a restraint on freedom of movement to the degree associated with a formal arrest. Kachinsky's decision not to bring a suppression motion was reasonable trial strategy based on the facts and the law. We will not second-guess trial counsel's selection of strategies in the face of considered alternatives. ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325. In any event, the trial court stated that it would have denied the motion had Kachinsky brought it. Accordingly, Kachinsky's decision did not prejudice Peterson.

¶15 Peterson next contends that Kachinsky failed to meaningfully cross-examine Liethen—specifically, that he should have asked her to clarify what the "it" referred to ("that's not when it happened") because Peterson may have meant the sleepover, not a sexual assault. Kachinsky testified that he did not want to highlight the statement or, due to Liethen's law enforcement training, have her "put a spin on it." He instead chose to elicit testimony that Michael did not exhibit fear of Peterson. Again, Kachinsky chose from among reasonable trial strategies.

¶16 Similarly, Kachinsky reasonably opted not to try to impeach the credibility of the "other acts" witnesses called to testify about Peterson sexually assaulting them. Peterson asserts that Kachinsky should have asked them about prior juvenile adjudications or a criminal traffic conviction. Kachinsky's decision not to try to impeach these witnesses could have had no impact on the jury verdict. The witnesses' credibility was bolstered when the jury heard several testify to the same facts, the brother of one victim testify that he saw Peterson assaulting his sister, and a police detective testify that Peterson admitted his attraction to prepubescent girls and his "inappropriate" conduct with one of the victims.

¶17 Peterson next contends that Kachinsky was ineffective for advice given when new other-acts evidence surfaced just before trial. Trial was set to start on a Monday. The Friday before, the brother of one of the girls who Peterson allegedly sexually assaulted reported that Peterson also had assaulted him. On the morning of trial, the prosecutor moved to admit this additional other-acts evidence. Kachinsky proposed that if the court would exclude it, he would not argue that all of the other-acts victims were girls. The court put the choice to Peterson: (1) accept Kachinsky's proposal or (2) not exclude the evidence but delay trial to allow the defense to investigate the boy's claim. Peterson testified at the postconviction motion hearing he did not recall the court giving him the option of a continuance or Kachinsky discussing it with him, and that he "think[s]" he would have considered delaying the trial had the option been made clear to him.

¶18 Advising Peterson to opt for excluding the new other-acts evidence not only was reasonable, it is hard to fathom why Peterson might think the alternate choice would make any sense. His defense was that Michael fabricated the assault, a point strengthened by the fact that all of the other known victims were girls. Allowing evidence in of another boy victim would undermine that claim. Even though Kachinsky could not argue that Peterson preyed only on girls, the jury would have been aware of the other victims' genders. Kachinsky's action on this point was neither deficient nor prejudicial.

¶19 Peterson next broadly asserts that Kachinsky breached supreme court rules mandating that a lawyer negotiate for, consult and maintain communication with and reasonably inform his or her client about the status of the case, that Kachinsky did not render full and candid advice about the plea offers and that Kachinsky's simultaneous involvement in a judicial election materially limited the amount of time Kachinsky could devote to his case. These conclusory

allegations of ineffective assistance, unsupported by specific factual assertions, are legally insufficient. *See* ***State v. Washington***, 176 Wis. 2d 205, 215-16, 500 N.W.2d 331 (Ct. App. 1993). A defendant alleging that counsel was ineffective for failing to take certain steps must show specifically what the actions would have revealed and how they would have altered the outcome of the proceeding. ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

¶20 Furthermore, the record belies those claims not too vague to address. Peterson testified at the ***Machner*** hearing that he knew: the State would agree to drop the persistent repeater enhancer if he pled; the potential penalties with and without the penalty enhancer; and that even on a plea he likely would get the maximum because of his offense history. A defendant is adequately informed if made aware of the maximum term of imprisonment, even if not explicitly instructed of the breakdown between initial incarceration and extended supervision. *See* ***State v. Sutton***, 2006 WI App 118, ¶¶14-15, 294 Wis. 2d 330, 718 N.W.2d 146.

¶21 Peterson next contends Kachinsky was ineffective for not seeking to narrow the roughly six-month charging period and then introducing alibi evidence for a portion of the period. A defendant is entitled to be informed of the charges, including the time frame in which the assault allegedly occurred. ***State v. Fawcett***, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988). Whether the period of time alleged in the charging documents is too expansive to allow the defendant to prepare an adequate defense is an issue of constitutional fact which we decide independently of the trial court. ***Id.*** at 249. In a case involving a child victim, we apply notice requirements more flexibly because numerous circumstances may cause the exactness as to time of events to fade in the child's memory. *See* ***id.*** at 249, 254.

¶22 Michael's mother testified that Michael stayed overnight at Peterson's at least twice and perhaps up to five times. One she could pin to May 2003 because she was at a church retreat. Michael testified that the assault occurred "about fifteen days" before his June 24 birthday. Kachinsky testified that he did not move to narrow the charging period because of the nature of the evidence and the fact that Peterson and the boy knew each other, giving the State some latitude in charging. As to the alibi defense, Peterson acknowledged that he never told Kachinsky about a trip he took to Texas from June 14-19, 2003. "[A] purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." ***State v. Harp***, 2005 WI App 250, ¶16, 288 Wis. 2d 441, 707 N.W.2d 304 (citation omitted). Kachinsky's failure to investigate a potential alibi of which Peterson did not inform him is not ineffective assistance.

¶23 The last issue is whether the trial court improperly admitted other-acts evidence when it allowed the State to introduce evidence of three instances in which Peterson had sexually assaulted young girls who, like Michael, were in Peterson's sphere of acquaintance. We employ a three-step analytical framework to determine the admissibility of other-acts evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998). First, we analyze whether the State offered the other-acts evidence for a purpose that comports with WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 783. Next, we consider whether the other-acts evidence is relevant. ***Id.*** at 785. Lastly, we determine whether the trial court erroneously exercised its discretion in admitting the evidence despite the probative value being outweighed by the danger of undue prejudice, confusion, or waste of time. ***Id.*** at 789. Alongside this general framework, Wisconsin recognizes that in child sexual assault cases, courts permit "greater latitude of proof as to other like occurrences." ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d

606 (citation omitted). We review the trial court's decision for an erroneous exercise of discretion. *See* ***id.***, ¶80.

¶24 The court examined at length five cases the State sought to introduce as other-acts evidence, considering each in the light of the ***Sullivan*** analysis as tempered by ***Davidson***. In the end, it allowed the State to use three of them. Before the jury heard the evidence and again before deliberations, the court advised the jury of the limited purpose for which the evidence was offered. *See* WIS. STAT. §§ 904.04(2), 904.03. Cautionary instructions help to limit the danger of unfair prejudice that might result from other-acts evidence. ***Davidson***, 236 Wis. 2d 537, ¶78. Since we presume that jurors follow the court's instructions, a cautionary instruction normally is sufficient to cure any adverse effect attendant with the admission of other-acts evidence. ***State v. Anderson***, 230 Wis. 2d 121, 132, 600 N.W.2d 913 (Ct. App. 1999). We see no misuse of the court's discretion.

By the Court.—Judgment and order affirmed.

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