COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1677-CR **Cir. Ct. Nos. 99 CF 2552 & 99 CF 5859**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL SCHULTEIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Michael Schulteis appeals from a judgment entered after a jury found him guilty of two counts of first-degree sexual assault of a child,

contrary to WIS. STAT. § 948.02(1) (1999-2000).[1] He also appeals from an order denying his postconviction motion alleging ineffective assistance of counsel. He claims the trial court erred in denying his motion without conducting an evidentiary hearing and that he is entitled to a new trial in the interests of justice. Because the trial court did not err in summarily denying Schulteis's postconviction motion, we affirm.

I. BACKGROUND

¶2 On May 18, 1999, Schulteis picked up twelve-year-old Markisha J. and took her back to his apartment to wash some dishes. Markisha testified that when they arrived, Schulteis put on a videotape which depicted sexual scenes between men and women, and then Schulteis rubbed her buttocks. Later in the kitchen, while Markisha was doing the dishes, Schulteis came up behind her and rubbed her breast. Schulteis then drove her home and took Markisha's eleven-year-old sister, Nekisha B., back to his apartment to complete the chores.

¶3 After Schulteis left, Markisha told her mother, Gloria B., that Schulteis had touched her buttocks and breast. Gloria went over to Schulteis's apartment to get Nekisha. Nekisha said that Schulteis had forced her into his bedroom, removed her clothes, and sexually assaulted her. The police advised Gloria to take her daughters to Sinai Samaritan Medical Center. Ayisha Shepard, a sexual assault treatment nurse at Sinai Samaritan hospital, interviewed and examined Nekisha on May 18, 1999. Shepard testified that Nekisha reported

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. The two counts stemmed from separate cases, which were consolidated for trial and consolidated for appeal.

"penis to vagina assault with penetration," but she did not name the assailant. Shepard did not observe any injuries, but she could not conduct a full examination because it would have caused the child too much discomfort.

¶4 Three days later, Gloria took Nekisha to be examined at the Child Protection Center. Judy Walczak, a pediatric nurse at the Center who was trained to evaluate child sexual abuse cases, examined Nekisha and discovered a tear in the girl's hymen along with bruising and discoloration around the laceration.

¶5 Janice Schroeder, a forensic scientist with the state crime laboratory, testified that she could not identify any semen on the child's vaginal smear, but she did find sperm on Nekisha's underwear. The DNA in the sperm matched Schulteis's DNA.

¶6 Gloria testified at trial and told the jury that, despite counseling, Nekisha refused to talk about the incident. The jury found Schulteis guilty of two counts of first-degree sexual assault of a child.

¶7 Schulteis filed a postconviction motion alleging that his trial counsel was ineffective and that he was entitled to a new trial in the interests of justice. The trial court summarily denied the motion. He now appeals.

II. DISCUSSION

¶8 Schulteis argues that the trial court erred when it denied his ineffective assistance claim without conducting an evidentiary hearing. We disagree.

¶9 If an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory

allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 313-18, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege, with specificity, both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶10 Schulteis alleged that his trial counsel was ineffective for: (1) failing to present timeline evidence to show that Schulteis was alone with Nekisha for fifteen-to-twenty minutes; (2) failing to call Nekisha as a witness; (3) failing to adequately represent the relevance of proffered witnesses Lashan Gates and Kenneth Brimmer; (4) failing to present an "I was framed" defense consistent with the DNA evidence and supported by Gates's and Brimmer's testimony; and (5) failing to timely object to the State's assertion during closing argument that Nekisha was unable to testify.

A. Timelines.

¶11 Schulteis claimed his trial counsel should have presented the "timeline" evidence to the jury. This evidence included witnesses who would testify that Schulteis arrived at his apartment with Nekisha between 4:49 and

4:53 p.m., and that three men arrived to "beat Schulteis up" at 5:15 p.m. Thus, he argued that he would not have had enough time to assault Nekisha.

¶12 In the postconviction ruling, the trial court found that the timeline evidence, even if presented, would not entitle Schulteis to relief because there is no reasonable probability that the jury would have reached a different verdict even if they heard the timeline evidence. The trial court reasoned that the timeline evidence would have been insufficient to overcome the strong medical and DNA evidence presented by the State. We cannot conclude that this ruling constituted an erroneous exercise of discretion. Twenty minutes alone is sufficient time for a sexual assault to occur and, given the additional evidence, this allegation was insufficient to trigger an evidentiary hearing.

B. Failing to Call Nekisha as a Witness.

¶13 Schulteis claims his trial counsel was deficient for failing to call Nekisha as a witness. He suggests that her testimony would have easily been impeached because of two inconsistent statements that she gave shortly after the assault occurred. Because she did not testify, the jury did not hear about her two inconsistent statements. Schulteis also suggests that trial counsel could have called Nekisha outside the presence of the jury to determine whether or not she would in fact testify. The State represented that Nekisha was too traumatized to testify and that, if called to the stand, she would remain mute.

¶14 The trial court found that even if the failure to call Nekisha was deficient, it is pure speculation as to whether or not Nekisha would have been able to testify, and speculative as to what she would have said. In his postconviction motion, Schulteis failed to present evidence that Nekisha would have been able to testify. As the trial court pointed out, if Nekisha was called to testify and said

nothing, the outcome of the trial would not have been affected. Thus, Schulteis has failed to prove prejudice, and there was no need to conduct an evidentiary hearing.

¶15 Moreover, by not calling Nekisha, the defense was able to employ a strategy of attacking the State's case. Trial counsel argued that the State failed to meet its burden of proof because the only direct witness to the assault, Nekisha, did not testify. This was a reasonable strategy.

C. Gates and Brimmer Testimony.

¶16 Next, Schulteis contends his trial counsel was ineffective for failing to call witnesses Gates and Brimmer in his defense. Schulteis contends that Gates would have testified that she heard two women talking about removing a condom from a trash container and picking it up with a tissue; one of these women was Gloria. Brimmer would testify that he saw Gloria coming out of Schulteis's apartment with her daughter, handing her daughter a tissue, and telling her to hold on to it. Schulteis suggests that this testimony would have supported his belief that Gloria planted his semen from the condom in her daughter's underpants, which explains why a DNA match occurred.

¶17 In the postconviction ruling, the trial court determined that even if the testimony of Gates and Brimmer was relevant, the trial court would have excluded the testimony under WIS. STAT. § 904.03 because it was "extraordinarily speculative" and the evidence would have confused and misled the jury and forced them to speculate: "The jury would have had to speculate that this was the condom that the defendant purportedly used vis a vis the child and that the mother had the wherewithal and the knowledge to plant semen in the child's underwear" before transporting her to Sinai Samaritan hospital. The trial court's discretionary

decision was reasonable. The jury is not permitted to decide a case based on pure speculation, and an evidentiary hearing was not required.

¶18 Moreover, the defense strategy was to present a defense that the assault of Nekisha did not occur. To bring in the condom evidence would have raised questions about Schulteis's recent ejaculation into a condom. Trial counsel's decision to forego use of the condom/tissue evidence was reasonable.

D. "I was framed" Defense.

¶19 Schulteis contends that his trial counsel failed to adequately investigate or present his theory of defense that he was framed for the sexual assault of Nekisha. This argument is essentially a rehashing of the previous argument and dependent upon the testimony of Gates and Brimmer. Because the trial court indicated that the testimony of these witnesses would have been excluded pursuant to WIS. STAT. § 904.03, and we have concluded that the trial court's decision was reasonable, it is not necessary for us to further address this allegation.

E. Prosecutor's Comment During Closing.

¶20 Schulteis argues that trial counsel was deficient for failing to timely object during the prosecutor's closing argument when the prosecutor told the jury: "My job is not to hurt an 11-year-old girl who I know can't testify." Trial counsel waited until the jury had been released and then objected to the statement and moved for a mistrial. The trial court ruled that an error had occurred but, because the jury would be instructed that closing arguments are not evidence, there was no prejudice.

¶21 Schulteis contends that this was a case where the jury might reasonably have questioned why Nekisha did not testify and that the prosecutor's statement gave the jury an answer to that question. Schulteis suggests that this creates prejudice. We disagree.

¶22 First, we presume that the jury follows the cautionary instructions given to them by the trial court. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Second, the reason that Nekisha did not testify was already in evidence through the testimony of Gloria who indicated that Nekisha would not talk about the incident. Gloria testified that if asked about the assault: "She'll put her finger in her mouth and she won't say nothing, she'll just start crying." Thus, the jury had already heard evidence that Nekisha was unable to testify because she was traumatized by the event. Therefore, even if trial counsel had timely objected to the statement, there is no reasonable probability that the outcome of the trial would have been different.

¶23 Finally, Schulteis argues that he is entitled to a new trial in the interests of justice. He argues that the "real controversy was not fully tried" because the "I was framed" evidence was not presented to the jury. We are not persuaded. We have upheld the trial court's rulings regarding the exclusion of the "frame-up" evidence and, therefore, see no reason to grant Schulteis's request for a new trial.

By the Court.—Judgment and order affirmed.

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