COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1923-CR **Cir. Ct. No. 99 CF 1140**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROGER I. ABRAHAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Roger I. Abrahams appeals from a judgment entered after a jury found him guilty of two counts of first-degree sexual assault of a child and one count of attempt to commit first-degree sexual assault of a child,

contrary to WIS. STAT. §§ 948.02(1) and 939.32 (1999-20000).[1] He also appeals from an order denying his postconviction motion. Abrahams claims: (1) the trial court erroneously exercised its discretion in granting the State's motion to allow the introduction of "other acts" evidence; (2) the trial court should have excluded certain hearsay evidence; (3) the trial court erred when it denied Abrahams's postconviction claim alleging ineffective assistance of trial counsel; and (4) the jury instructions were erroneous. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

¶2 On March 5, 1999, Abrahams was charged with: first-degree sexual assault of a child (five-year-old Matthew P.); child enticement—sexual contact or intercourse with a child (five-year-old Austin M.); and first-degree sexual assault of a child (seven-year-old Damian M.). Each charge arose from separate incidents. The first stemmed from Matthew's report in June 1995 that his neighbor/babysitter, Abrahams, sucked on his penis. The second stemmed from Debbie M.'s (the mother of Austin and Damian) report that when she went looking for her sons on February 23, 1999, she found Austin in Abrahams's bedroom. Abrahams lived in the flat above the M.'s apartment. When Debbie opened the door and walked into the bedroom, she saw Abrahams, who was lying on the bed, immediately turn away from Austin. Then she saw Austin, who was standing by the bed right where Abrahams's head had been. Austin was pulling up his pants and underwear. Debbie's older son, Damian, then reported that Abrahams also

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

had put his mouth on his (Damian's) penis. The latter was the basis for the third count.

¶3 The case was tried to a jury, which convicted Abrahams on all three counts. He filed a postconviction motion which was denied. Abrahams now appeals.

II. DISCUSSION

A. Other Acts.

¶4 Abrahams makes two claims related to the trial court's ruling on other acts evidence. He first asserts that the trial court erroneously exercised its discretion when it allowed into evidence eleven of the eighty-five pornographic images discovered on Abrahams's computer. The images reflected naked boys, some of which suggested the subjects were engaging in homosexual activities. Abrahams claimed the images should have been excluded. The State argued that the images demonstrated motive and intent. The trial court agreed and allowed eleven images to be admitted. We cannot conclude that the trial court's decision was erroneous.

¶5 In commencing our review of the record, we are guided by the dictates of ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), which set forth a three-step analytical process to be applied in determining the admissibility of other acts evidence. This methodology seeks answers to the following three questions:

(1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident? ***Id.*** at 772.

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. *See* § 904.01. The second consideration in assessing relevance is whether the evidence has probative value; that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. ***Id.***

(3) Is the probative value of the other acts evidence 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? ***Id.*** at 772-73; *see also* WIS. STAT. § 904.03.

¶6 In ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606, our supreme court further explained that when, as here, the case involves the sexual assault of a child, "the greater latitude rule" for the admission of other acts evidence is to be applied at each stage of the ***Sullivan*** analysis.

¶7 The State offered the evidence to show Abrahams's motive and intent. The State explained that the child pornography demonstrated that he had a sexual interest in young boys, and thus provided a motive for having sexual contact with the victims in this case. The photos also suggested that Abrahams's contact with the boys' penises was intentional. Moreover, the fact that Abrahams maintained a collection of child pornography at the time these assaults occurred was relevant to a fact of consequence—his motive and intent. Abrahams's motive

was an element of the charged crime. Thus, the first two steps of the ***Sullivan*** test are satisfied.

¶8 The third step was whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Evidence is unfairly prejudicial only if it "would have 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." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). Under this standard, we cannot conclude that the eleven images admitted here were unfairly prejudicial. The jury was instructed by the trial court that it should not consider the evidence to conclude that Abrahams had a certain character or acted in conformity with that character. Moreover, both the prosecutor and defense counsel informed the jury that the evidence could only be used to determine Abrahams's intent and could not be used to infer that he is a "pervert" and thus must have committed the crimes charged.

¶9 Having concluded that the ***Sullivan*** test was satisfied, we cannot hold that the trial court erroneously admitted the pornographic images. Accordingly, we reject Abrahams's claim for relief on this basis.

¶10 Abrahams's second objection to other acts evidence involved his assertion that the trial court should have denied the State's motion *in limine* with regard to a ten-to-twelve-year-old videotape. The videotape depicted Abrahams engaged in sexual activity with the M.'s father, Robert, when Robert was a teenager. The State argued that the tape was admissible to show motive and intent and depicted activity strikingly similar to the conduct forming the bases of the

charges here. The trial court agreed with the State and ruled the tape was admissible. Before the start of the trial, however, the prosecutor advised defense counsel that it had decided not to use the tape. The prosecutor honored that statement and never used the tape at trial.

¶11 Abrahams argues, however, that the erroneous ruling violated his Fifth or Sixth Amendment rights because the decision influenced his decision not to testify in his own defense and affected how his attorney performed. We are not persuaded. Abrahams was advised before the trial commenced that the tape would not be used. Thus, the ruling could not influence his decision about testifying. Abrahams also refers to his counsel's remarks during opening statement indicating that Abrahams had engaged in a consensual homosexual relationship with the M.'s father, Robert. Abrahams suggests that counsel advised the jury of this only because of the tape and that if the tape was not going to be used, the jury should not have been advised of this prejudicial information. We disagree. Defense counsel did not reference the tape during opening statement. Rather, the information conveyed to the jury was intended to lay the groundwork for the defense theory that Debbie M. (Robert's wife and the M.'s mother) was falsely accusing Abrahams of the assaults because she was angry with Robert and Abrahams for engaging in a homosexual relationship. This was a reasonable strategy.

B. Admission of Hearsay.

¶12 Abrahams next objects to the trial court's decision to allow Matthew's mother, Patricia, to tell the jury that Matthew told her Abrahams sucked on Matthew's penis. The trial court admitted the statement under the excited utterance exception to the hearsay rule. Abrahams challenges this ruling.

¶13 Under WIS. STAT. § 908.03, "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: … (2) EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception has three requirements: (1) there must be a startling event or condition, ***Muller v. State***, 94 Wis. 2d 450, 466, 289 N.W.2d 570 (1980); (2) the declarant must make an out-of-court statement that relates to the startling event or condition, ***State v. Huntington***, 216 Wis. 2d 671, 682, 575 N.W.2d 268 (1998); and (3) the related statement must be made while the declarant is still "'under the stress of excitement caused by the event or condition,'" ***Muller***, 94 Wis. 2d at 466.

¶14 Abrahams argues that Patricia should not have been allowed to tell the jury about the statement Matthew made. Patricia testified that when she picked him up to look at a construction project, Matthew expressed pain from sores on his penis. When his mother indicated they would go to the doctor, Matthew said, "[t]his means that Roger can't suck on my penis any more; right Mom?"

¶15 Abrahams argues that the statement does not qualify as an excited utterance because there is no evidence as to the timing of the statement with respect to the date of the alleged assault, and there is no evidence that the statement was made while Matthew was under the stress or excitement of the alleged sexual assault. We reject Abrahams's claim.

¶16 As noted, Matthew's statement was made after his mother picked him up and he felt pain from the sores on his penis. He was startled by the pain, and made a spontaneous statement while under that stress. Under these circumstances, the statement was properly admitted as an excited utterance.

C. Ineffective Assistance.

¶17 Abrahams next asserts that the trial court erred when it denied his postconviction motion seeking a new trial on the basis that his trial counsel was ineffective. Abrahams claimed that trial counsel was ineffective for: (1) failing to move to sever count one from counts two and three; and (2) stating during opening that Abrahams was a homosexual. Our review compels us to reject Abrahams's claim.[2]

¶18 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶19 An attorney's performance is not deficient unless he or she made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. To satisfy the prejudice prong, appellant

[2] Abrahams also claims that the trial court denied the postconviction motion without waiting for his supplemental affidavit and reply brief. His basis for this claim is that the trial court dated the decision May 27, 2001, and his reply brief was not filed until June 25, 2001. We summarily reject this claim. Although we note that the trial court's decision does reflect the date of May 27, 2001, we agree with the State that the evidence clearly demonstrates that the month "May" was a typographical error. Our decision is based on two significant facts. First, the decision was not formally filed, as evidenced by the date stamp, until June 27, 2001. Second, the decision itself specifically refers to both the original and supplemental affidavits filed by the defense.

must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose results is reliable." ***Id.*** at 687.

¶20 Whether counsel's actions constituted ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***Id.*** at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶21 With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. ***Strickland***, 466 U.S. at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. Rather, he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** at 694.

¶22 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.*** 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.

¶23 Here, the trial court denied Abrahams's motion without conducting an evidentiary hearing. We conclude that the trial court did not err. The record conclusively demonstrates that trial counsel did not perform deficiently and that any alleged deficiencies did not prejudice Abrahams.

¶24 First, Abrahams asserts trial counsel should have moved to sever count one from counts two and three. He suggests that if the cases had been severed, he would have chosen to testify on count one and that the other acts evidence had significantly more impact on count one. He argues that the other acts evidence would have been excluded in a trial solely on count one if severance had been granted. We reject Abrahams's claim.

¶25 Charges which are joined together may be severed if a trial on the joined charges would substantially prejudice the state or the defendant. ***Holmes v. State***, 63 Wis. 2d 389, 395-96, 217 N.W.2d 657 (1974). When evidence of the counts sought to be severed would be admissible at a separate trial of each count, there is no significant risk of prejudice. ***State v. Hall***, 103 Wis. 2d 125, 141, 307 N.W.2d 289 (1981).

¶26 Abrahams asserts that the other acts evidence would not be admitted at a trial on the count involving only Matthew. The trial court ruled otherwise and we agree with the trial court. The other acts evidence here, which was offered to prove Abrahams's motive and intent to assault young males, would be relevant to the first charge even if that count had not been joined with the second and third counts. Abrahams also contends that the other acts evidence was "overwhelmingly prejudicial" as to count one. We are not persuaded. Both counts one and three involved mouth-to-penis contact with young boys, which is the same conduct depicted in the other acts evidence. The probative value of the other acts evidence is equally great on both counts. There is no reason to admit the other acts evidence on counts two and three, but exclude it on count one if the cases are tried separately. Because the other acts evidence would have been admissible at separate trials, joinder of the offenses for trial was not prejudicial and severance of the charges was not warranted on this basis.

¶27 Abrahams also contends that if the cases had been tried separately, he would have testified to rebut evidence admitted relative to count one. Abrahams fails to explain, however, why he could not present the proffered testimony without the case being severed. As noted in ***State v. Nelson***, 146 Wis. 2d 442, 432 N.W.2d 115 (Ct. App. 1988):

> No need for a severance exists until the defendant makes a convincing showing that he or she has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of "economy and expedition in judicial administration" against the defendant's interest in having a free choice with respect to testifying.

Id. at 458 (internal punctuation, brackets and citation omitted). Abrahams has failed to satisfy this test. Although Abrahams offers a summary of testimony that would have been helpful to rebut the charges in count one, he fails to demonstrate why he had a "strong need to refrain from testifying" on counts two and three. Accordingly, Abrahams has failed to demonstrate that trial counsel was ineffective for failing to move for severance.

¶28 Abrahams's second assertion is that trial counsel provided ineffective assistance when she told the jury during opening statement that Abrahams was a homosexual and had a homosexual relationship with the M.'s father. Again, we reject this contention. It is clear from the record that the intent of defense counsel in advising the jury of this information was to suggest a motive for Debbie to lodge false charges against Abrahams. This was a viable theme, and a reasonable strategy. The fact that the strategy failed in the end cannot create the basis for an ineffective assistance claim. Moreover, as the State points out, the jury was instructed that the case should be decided based on the evidence, and cautioned that opening statements do not constitute evidence.[3]

[3] Abrahams also alleged that trial counsel was ineffective for failing to request the use of a stipulation such as that in ***State v. Wallerman***, 203 Wis. 2d 158, 167, 552 N.W.2d 128 (Ct. App. 1996), in an effort to keep out other acts evidence. In ***Wallerman***, this court acknowledged that a defendant may enter into a stipulation where he or she concedes to the motive and intent elements of the charges in order to prevent the introduction of other acts evidence. ***Id.*** at 166-68. Abrahams's argument here, however, is specious and undeveloped. Moreover, even a cursory independent review demonstrates that a ***Wallerman*** stipulation was not a reasonable strategic choice. First, Abrahams argues his counsel should have requested the stipulation as to *intent* on counts one and three. Even if trial counsel had done so, there were additional purposes under which the other acts evidence was admitted. Thus, a ***Wallerman*** stipulation would not have resulted in excluding the other acts evidence. Second, as pointed out by the State, the prejudice resulting from the stipulation would have been greater than presentation of possession of child pornography. Thus, if counsel had succeeded in attaining a stipulation, the jury would have been told that Abrahams admitted one of the elements of the charges. This would have been inconsistent with his defense. Accordingly, we see no ineffective assistance attached to trial counsel's failure to propose a ***Wallerman*** stipulation.

D. Jury Instructions.

¶29 Finally, Abrahams contends that his right to a unanimous verdict was violated because of improper jury instructions. He argues that the trial court should have read the first-degree sexual assault instruction separately for count one and count three. Instead, the trial court read the instruction only one time and used "and/or" to refer to the different counts.

¶30 Abrahams, however, failed to timely object to the jury instructions given and, therefore, has waived his right to have this claim reviewed. ***State v. McBride***, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994) ("A party's failure to raise an objection to the instructions at trial constitutes a waiver of that party's right to raise the objection on appeal.").

By the Court.—Judgment and order affirmed.

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