COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2135-CR **Cir. Ct. No. 2005CF831**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM CHRISTOPHER DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Adam Davis appeals a judgment convicting him of child enticement and using a computer to facilitate a sex crime. He also appeals an order denying postconviction relief. The issue is whether he received effective assistance of trial counsel. We affirm.

¶2 The State initially charged Davis with sexual assault of a child under sixteen and child enticement. The complaint alleged that on January 5, 2005, Laura B., then fourteen years old, sneaked out of her home and went to Davis's home after exchanging instant messages with him via computer. According to Laura, they then engaged in sexual intercourse. Although police had sufficient information within a day to identify Davis as a suspect, investigating officers did not make contact with him until March 4, 2005, after he was jailed on a probation hold. The same day, officers obtained a search warrant to search Davis's home and seize and examine his computer hard drive and storage media. The application stated that, in the applicant officer's training and experience, instant messages remain on a computer's hard drive for months or even years. As a result of the search, Davis was also charged with two drug counts. The State subsequently added the charge of using a computer to facilitate a sex crime. The drug charges were subsequently severed and resolved by a plea bargain.

¶3 While he was in jail, Davis made a monitored call to his home in which he discussed deleting information from his computer. At trial, a computer expert testified that information was deleted from Davis's computer on March 4, 2005.

¶4 A jury acquitted Davis on the sexual assault charge, but found him guilty of the enticement and computer charges. After his conviction, Davis filed a postconviction motion alleging that trial counsel provided ineffective representation in several respects, including the following omissions: (1) failed to move for suppression of the evidence seized pursuant to the March 4, 2005, search warrant; (2) failed to object to trial references to Davis's status as a jail inmate on March 4, 2005; and (3) failed to object to testimony that impermissibly vouched for Laura's credibility in her pretrial statements, and failed to object to the

prosecutor's comment in closing argument that referred to Laura's credibility. After a hearing on the motion, the circuit court denied relief, resulting in this appeal. Davis contends that the omissions of counsel listed above entitle him to a new trial.

¶5 To succeed on his claim of ineffective assistance, Davis must show both that counsel's representation was deficient and that the deficiency prejudiced him. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Whether he has proved either the deficiency or the prejudice prong presents a question of law that this court reviews without deference to the circuit court. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). If we conclude that Davis has not proved one prong, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). To prove deficient performance, Davis must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Id.*** at 690. In other words, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 688. To show prejudice, Davis must demonstrate a reasonable probability that, but for the error, the outcome of the proceeding would have been different. ***Id.*** at 694.

¶6 ***Suppression of evidence seized by search warrant***. Davis contends that counsel could have succeeded in suppressing the evidence seized at his home because the warrant application improperly stated that records of instant messages between Davis and Laura would likely be found on his computer, when in fact they were likely overwritten by the date of the warrant application. With that portion of the warrant application stricken, he contends that there was no probable cause to issue the warrant. However, a defendant alleging that a warrant was issued on false information must show that the applying officer made the false

statement knowingly and intentionally, or with reckless disregard for the truth. *See* ***State v. Marshall***, 92 Wis. 2d 101, 112, 284 N.W.2d 592 (1979) (citing ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978)). Davis has failed to show that counsel had access to any evidence that the applying officer acted in bad faith or with reckless disregard in this case, and thus has failed to show that counsel acted unreasonably by not pursuing suppression. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (trial counsel's failure to bring a meritless motion does not constitute deficient performance).

¶7 ***References to Davis's incarceration***. During trial, the prosecutor questioned Davis's father concerning Davis's phone conversations with his father in March 2005, and both the questions and answers referred to his incarceration at that time. Davis contends that these references were inadmissible and prejudicial, and counsel should have objected to them. We conclude that, even if counsel had a basis to object, his failure to do so was not prejudicial. The jury was not told why Davis was in jail, leaving the jury with the most obvious explanation that he was jailed on the charges in this case. We agree with the circuit court that the jury would not have been surprised that someone charged with sexually assaulting a child was in jail pending trial. The references to incarceration did not, therefore, carry with them the inference that Davis was guilty of other bad acts.

¶8 ***Statements vouching for the victim***. Davis contends that counsel should have objected to a police officer's testimony that Laura's statements to police were consistent. In his view, this testimony was inadmissible under the principle that no witness may give an opinion that another witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). However, the testimony he cites only addressed the consistency, not the truthfulness of the victim's statements. The officer's opinion that the statements

were consistent is not an opinion as to their truthfulness. Counsel therefore had no basis to object, and cannot be faulted for his failure to do so. Davis also suggests that counsel should have objected when Laura herself testified that the statements were consistent. Again, an opinion that statements are consistent is not an opinion as to their truthfulness and, even if it were an opinion on truthfulness, Davis offers no authority for the proposition that a witness cannot vouch for her own credibility.

¶9 Counsel also had no basis to object to the prosecutor's closing statement that "I'm going to tell you the reasons why I believe Laura should be believed in this case." A prosecutor may not "tell a jury what he or she believes is the truth of the case, unless it is clear that the lawyer's belief is merely a comment on the evidence before the jury." ***State v. Jackson***, 2007 WI App 145, ¶22, 302 Wis. 2d 766, 735 N.W.2d 178, *review denied*, 2007 WI 120, 304 Wis. 2d 611, 741 N.W.2d 241 (No. 2006AP1240-CR). Nor may a lawyer state a personal opinion as to the credibility of a witness. SCR 20:3.4. However, a prosecutor may comment on the evidence, argue to a conclusion from the evidence, and may state that the evidence convinces him or her and should convince the jury. ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). The prosecutor's comment here merely prefaced his proper and nonobjectionable argument as to why the evidence, consisting of Laura's testimony, should convince the jury to find Davis guilty. It was not an improper expression of the prosecutor's opinion on the case or Laura's credibility. Additionally, the prosecutor made the comment while addressing Laura's testimony that Davis sexually assaulted her. The jury acquitted him of sexual assault, and Davis therefore suffered no prejudice from the prosecutor's comment even if it was objectionable.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).