COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0009-CR **Cir. Ct. No. 99-CF-563**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOEL P. HOFFMAN,

DEFENDANT-APPELLANT.

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

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Joel P. Hoffman appeals from a judgment of conviction of second-degree sexual assault and from an order denying his postconviction motion alleging ineffective assistance of trial counsel. Hoffman argues that trial counsel was deficient in not challenging the voluntariness of his statement to police and by not calling himself and his mother as witnesses at trial.

He also seeks a new trial in the interests of justice. We affirm the judgment and order.

¶2 Hoffman had a confrontation with his estranged wife, Corrine, when she came to pick up their two-year-old son on June 8, 1999. Corrine testified that Hoffman forcibly carried her into a bedroom, pinned her down on the bed, attempted to remove her clothing, fondled her breast, and when she managed to get up from the bed, he tried to prevent her from leaving the house. As the incident continued outside the home, Hoffman started his car as Corinne was half way in the car window attempting to retrieve her car keys. Hoffman then got in Corinne's car and refused to leave. Hoffman told Corinne he was going to kill her and that he had a gun for that purpose. As a result of the incident, Hoffman was charged with second-degree sexual assault, false imprisonment, second-degree recklessly endangering safety while armed with a dangerous weapon, and disorderly conduct. The jury found him guilty only of second-degree sexual assault and he was acquitted on the three other charges.

¶3 Hoffman argues that he was denied the effective assistance of trial counsel. "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review

de novo. ***Id.*** As to the performance prong, we determine whether trial counsel's performance fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. ***Id.*** We presume that counsel's performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. ***Id.*** The prejudice prong questions whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. ***State v. Pitsch***, 124 Wis. 2d 628, 640-41, 369 N.W.2d 711 (1985). An error is prejudicial if it undermines confidence in the outcome. ***Id.*** at 642.

¶4 Hoffman first contends that trial counsel was ineffective for not challenging the admissibility of his statement to police and for waiving a ***Miranda-Goodchild***[1] hearing. He claims counsel should have recognized that Hoffman's cognitive deficiencies and his state of exhaustion and anxiety when the statement was given rendered his statement involuntary.[2] He considers the statement prejudicial because the police officer testified that Hoffman mentioned that he was obsessed with his wife and that he was on a two-week leave of absence from work because his obsession with his wife was interfering with work.

¶5 Trial counsel testified that he explored with Hoffman whether the signature on the ***Miranda*** waiver form was in fact Hoffman's. Hoffman and

[1] At a ***Miranda-Goodchild*** hearing the issues to be decided are the voluntariness of the statements, the proper giving of the ***Miranda*** warnings, and the intelligent waiver of the ***Miranda*** rights. ***Norwood v. State***, 74 Wis. 2d 343, 362, 246 N.W.2d 801 (1976).

[2] Hoffman had suffered severe head trauma which left permanent mental disabilities causing him to lose track in his thinking.

counsel were satisfied that it was. Counsel also asked Hoffman if the statement to police was voluntary; Hoffman told counsel it was. The trial court found that counsel relied on Hoffman's indication that the statement was voluntary and that counsel determined that a ***Miranda-Goodchild*** hearing would be a waste of time because the statement would not be suppressed. The trial court's findings are not clearly erroneous. Counsel's performance as influenced by Hoffman's own admission of voluntariness was within the range of reasonableness. *See* ***Pitsch***, 124 Wis. 2d at 637 (reasonableness of counsel's actions may be substantially influenced by the defendant's own statements and actions).

¶6 Additionally, and bearing on the prejudice prong, a claim that a statement was involuntary requires a showing of coercive police activity. ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987); ***State v. Owen***, 202 Wis. 2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996). There is no suggestion here of police coercion or improper practices compelling the statement. Hoffman testified at the postconviction hearing that the police interview lasted only about one-half hour. Mere fatigue or anxiety would not automatically render a statement involuntary. *See* ***United States v. Casal***, 915 F.2d 1225, 1229 (8th Cir. 1990). Had the ***Miranda-Goodchild*** hearing been conducted, the State would have had no problem in meeting the required two prima facie burdens by the signed waiver indicating that Hoffman had been read his rights, that he understood them and was willing to make a statement and the absence of duress, threats, coercion or promises.[3] *See* ***State v. Lee***, 175 Wis. 2d 348, 360-61, 499 N.W.2d 250 (Ct. App. 1993).

[3] The two prima facie burdens are:

(continued)

¶7 While Hoffman may show by countervailing evidence that his waiver was not knowing and intelligent, ***id.*** at 361, his suggestion that he had cognitive disabilities does not rise to the level of proof that he lacked the requisite level of comprehension necessary to make a knowing and intelligent waiver of his ***Miranda*** rights.[4] Hoffman self-describes his cognitive disabilities as causing him to lose track in his thinking and memory problems. The impairment would only affect the content and flow of the statement and not the comprehension necessary to make the initial waiver decision valid. Hoffman has not proven otherwise by medical evidence. *Cf.* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (a defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case). Hoffman has no other personal characteristics which would suggest that his statement was either involuntary or the result of an unintelligent or unknowing waiver. *See* ***State v.***

> [A]s to ***Miranda***, the general rule is that a prima facie case will be established "when the state has established that defendant has been told or has read all the rights and admonitions required in ***Miranda***, and the defendant indicates he understands them and is willing to make a statement."
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> ….
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> Under the ... ***Goodchild*** standard, a prima facie case will be established "when the state has established that the statement to be offered is, in fact, the statement of the defendant, that he was willing to give it, and that it was not the result of duress, threats, coercion or promises."

State v. Lee, 175 Wis. 2d 348, 360, 499 N.W.2d 250 (Ct. App. 1993) (quoting ***State v. Mitchell***, 167 Wis. 2d 672, 697-98, 482 N.W.2d 364 (1992)).

[4] ***Lee*** explains that police coercion is only a prerequisite to a determination that the statement was involuntary and that a knowing and intelligent waiver is a separate inquiry based on the totality of the circumstances. *See* ***Lee***, 175 Wis. 2d at 355-57.

Franklin, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App. 1999) (relevant considerations are age, education, intelligence, physical and emotional condition, and prior experience with the police). Hoffman was twenty-eight years old, had a prior conviction and police contact experience, and there is no indication that he lacked sufficient intelligence to understand.

¶8 We conclude that not only did counsel make a reasonable determination that there was no basis to challenge the statement, but that Hoffman was not prejudiced. Hoffman was not denied the effective assistance of counsel on this point.

¶9 Hoffman next claims that his mother should have been called as a witness at trial. He contends his mother would have testified that Corrine did not mention a sexual assault in a phone conversation the two had right after the incident. Also, his mother could have explained the on-going custody dispute between Hoffman and Corrine and Hoffman's head injury and resulting mental impairments. Hoffman characterizes his mother's testimony as an opportunity to present the "true picture" of what occurred.

¶10 In a similar vein, Hoffman argues that trial counsel was ineffective for not allowing him to testify at trial. He explains that his testimony would not only have explained that he did not use the term "obsession" in his statement to police and what he actually said, but would also have brought to light his condition and status at the time the statement was made.

¶11 The trial court found that as a matter of strategy trial counsel determined not to call Hoffman or his mother. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d

161 (1983). However, we will examine counsel's conduct to be sure it is more than just acting upon a whim; there must be deliberateness, caution, and circumspection. *See* ***id.*** A trial attorney may select a particular strategy from the available alternatives, and need not undermine the chosen strategy by presenting inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992).

¶12 Trial counsel testified that he had planned on calling Hoffman's mother but as the trial progressed, counsel determined a better theory of defense was that the State had failed to meet its burden and that the defense did not need to call any witnesses. Counsel explained how cross-examination of Hoffman's mother could have been damaging because it would confirm that right after the incident, Corrine was upset and asserting that Hoffman had threatened her. In deciding whether Hoffman should testify, counsel took into account that Hoffman had a prior conviction which could be used to impeach his testimony. Counsel thought Hoffman was potentially a poor witness since he was unable to stay on one subject and would drift off in narratives not related to the original question. He could have given damaging testimony without even realizing it.

¶13 We conclude that trial counsel's strategy decision was based on sound considerations. Cross-examination of Hoffman's mother would have confirmed Corrine's testimony that Hoffman had threatened her. It would have corroborated certain portions of Corrine's testimony. Although the mother's explanation of the custody dispute may have provided a basis for Corrine to fabricate the sexual assault, such evidence might also have confirmed a motive for

Hoffman to engage in assaultive behavior.[5] While explanations of Hoffman's cognitive impairments (either by Hoffman or his mother) may have called into question the reliability of his statement to police, it was not an explanation for his criminal conduct. To call Hoffman as a witness when he had a prior conviction and presented a risk as to what he would say was contrary to the theory of defense. Counsel was not required to pursue inconsistent approaches, particularly where the theory followed resulted in acquittal on three of the four charges. Counsel's failure to call Hoffman or his mother was not deficient performance.[6]

¶14 Hoffman seeks a new trial in the interests of justice. *See* WIS. STAT. § 752.35. He believes that the issue of credibility was not fully tried because the jury never heard evidence about his cognitive impairments, the conditions under which he made his statement to police, Corrine's phone call to his mother, and because the admissibility of his statement was not challenged. We have rejected all claims of error. A final catchall plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed. ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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

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[5] The jury learned that the parties were engaged in a custody dispute from Corrine's testimony.

[6] We recognize that Hoffman makes an oblique suggestion that trial counsel forced him to waive the right to testify by telling Hoffman to answer "no" when asked if he would testify. Testimony at the postconviction hearing establishes that the decision that Hoffman would not testify was made by Hoffman relying on consultation with and the advice of counsel.