COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0256-CR **Cir. Ct. No. 99-CF-1061**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID C. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. David Taylor appeals from a judgment entered on a jury verdict convicting him of repeated sexual assault of the same child contrary to

WIS. STAT. § 948.025(1)[1] and an order denying his motion for postconviction relief. Taylor contends he was denied effective assistance of counsel when his attorney failed to challenge the voluntariness of a statement he made to the police as well as not preparing a defense showing his victim had made previous false accusations of sexual assault. Taylor also argues the trial court erred when it admitted part of his statement to the police because it was other acts evidence. Finally, he argues he is entitled to a new trial because of these errors and in the interest of justice. We determine any error by the trial court's admission of Taylor's statement was harmless. For the same reason, we also reject Taylor's ineffective assistance of counsel claim based on the statement. In addition, we determine Taylor's counsel did present a defense based on the victim's prior accusations. Consequently, we deny Taylor's request for a new trial and affirm the judgment and order.

BACKGROUND

¶2 In November 1999, the State charged Taylor with one count of repeated sexual assault of the same child contrary to WIS. STAT. § 948.025(1). The charges stemmed from three incidents involving Taylor and Sarah K. during the summer of 1998. At the time, Taylor was a boyfriend of Sarah K.'s babysitter. The incidents took place when Sarah K. and Taylor were alone at the home of the babysitter, Paula Bacon.

¶3 During the following school year, Sarah K. told her school social worker about the incidents. The social worker made a referral to the Brown

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

County Human Services Department and the police began an investigation. In June 1999, Green Bay police detective Michael Josephson interviewed Taylor, Bacon, and one of her children at Bacon's house. Josephson interviewed Taylor in his squad car.

¶4 During the course of the interview, Josephson asked Taylor why he thought Sarah K. accused him of assaulting her. Taylor replied "Yeah, well, I guess, I don't know. I guess I have a reputation." Later in the interview, Josephson and Taylor discussed that Taylor's children had previously accused him of sexual abuse and that when he was younger he had been put in juvenile detention for sexually abusing his cousin.

¶5 At trial, Taylor's counsel objected to Josephson's testimony regarding the "reputation" statement. Although the court anticipated a challenge to the statement's voluntariness, Taylor's counsel only objected to the statement as evidence of a prior act, barred under WIS. STAT. § 904.04(2). The State said it did not intend to introduce evidence of the specific acts, just the "reputation" statement. The court admitted the statement, saying it could not find a basis to exclude it.

¶6 The defense called two of Sarah K.'s friends as witnesses. One testified Sarah K. had falsely accused Sarah K.'s father of sexually assaulting her. The State objected and, after a hearing, the court permitted Taylor's counsel to question Sarah K.'s friend regarding the accusations as an exception to the rape shield law, WIS. STAT. § 972.11. Taylor then questioned the girl and another of Sarah K.'s friends regarding the accusations and the extent of Sarah K.'s truthfulness.

¶7 Taylor was convicted and sentenced to twelve years in prison. He filed a motion for postconviction relief, alleging the court improperly admitted the "reputation" statement as other acts evidence and without holding a ***Miranda*/*Goodchild***[2] hearing to determine its voluntariness. He also argued he was denied effective assistance of counsel because his attorney did not properly challenge the admission of the "reputation" statement on these grounds and failed to file a pretrial motion to pursue a defense based on the victim's prior false allegations of sexual assault.

¶8 At the hearing, Taylor's trial counsel testified he did not challenge the voluntariness of the "reputation" statement because he did not believe there was a basis to do so. He also admitted he did not file a pretrial motion challenging the statement as other acts evidence. Finally, he said he did not file a motion under WIS. STAT. § 972.11 because he did not believe he could meet the statute's requirements. The court denied Taylor's motion and he now appeals.

DISCUSSION

A. Admissibility of the "reputation" statement

¶9 We first address Taylor's claim the trial court improperly admitted his "reputation" statement because it constituted other acts evidence. We discuss this issue first because its resolution is relevant to the resolution of Taylor's ineffective assistance of counsel claim.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

¶10 Taylor contends his statement, "I have a reputation," constitutes other acts evidence prohibited by WIS. STAT. § 904.04(2). That statute precludes presenting evidence that an accused committed some other act for the purposes of showing the accused has a corresponding character trait and acted in conformity with that trait. ***State v. Sullivan***, 216 Wis. 2d 768, 782, 576 N.W.2d 30 (1998). The statute does allow introduction of other acts evidence for other purposes, such as proving the defendant's motive or intent. WIS. STAT. § 904.04(2).

¶11 The trial court admitted the statement because it did not believe it was other acts evidence. In making the determination, the court said it did not believe there was a legal basis to exclude the statement, although the court held the State to its promise not to introduce evidence of the incidents to which the statement referred. The court said Taylor could take the stand if he wanted to explain the statement.

¶12 Taylor argues the court's ruling was wrong because the only possible inference the jury could reach after hearing the evidence was that he had a propensity to sexually assault young girls. In support, he points to ***State v. Kourtidias***, 206 Wis. 2d 574, 557 N.W.2d 858 (Ct. App. 1996). In ***Kourtidias***, the defendant, a convicted sex offender, was on trial for child enticement. ***Id.*** at 578. We determined the testimony of Kourtidias' parole officer, saying he was under supervision as a "high risk" sex offender, constituted impermissible other acts evidence because the "obvious message" of the testimony was that Kourtidias had committed similar criminal acts in the past. ***Id.*** at 581.

¶13 Taylor argues the "obvious message" of the "reputation" statement is that he must have engaged in conduct similar to that of which he was accused. The State suggests this is not the only message the jury could have gleaned from

the statement and, even if it were, the statement would have been admissible for other purposes. We need not resolve this issue, however, because we determine the introduction of the statement, even if it was improper other acts evidence, was harmless error.

¶14 An evidentiary error requires reversal or a new trial only when the improper admission of evidence has affected the substantial rights of the party seeking relief on appeal. WIS. STAT. § 805.18(2); ***Kourtidias***, 206 Wis. 2d at 586. We reverse only when there is a reasonable probability that the error contributed to the final result. ***Kourtidias***, 206 Wis. 2d at 586. In making this determination, we weigh the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict. ***Id.***

¶15 We determine any prejudicial impact the "reputation" statement may have had is greatly outweighed by other evidence supporting the verdict. The trial transcript reveals numerous instances where Sarah K. identified Taylor as the assailant. In addition, the fact Taylor lived with Bacon while she was babysitting Sarah K. and his admission to Josephson that he spent time alone with her "a bunch of times" provides evidence of opportunity. Taylor also told Josephson he had struggled with his own thoughts about abusing children. While Taylor's counsel attacked much of this evidence, the record does not show it is patently incredible. From this evidence, the jury could find Taylor guilty. We conclude the effect of admitting the statement was not so great as to suggest admitting it contributed to the jury's verdict.

B. Ineffective assistance of counsel

¶16 We next address Taylor's ineffective assistance of counsel claim. A criminal defendant alleging ineffective assistance of counsel must prove his or her

trial counsel's performance was deficient and that he or she suffered prejudice as a result. ***State v. Koller***, 2001 WI App 253, ¶7, 248 Wis. 2d 259, 635 N.W.2d 838. Our standard for reviewing this claim involves a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). At a postconviction hearing on the claim, the trial court is the ultimate arbiter of the credibility of trial counsel and all other witnesses. *See* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Thus, we will not reverse a trial court's findings of fact unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The issue of whether counsel's performance was deficient and prejudicial is a question of law. ***Johnson***, 153 Wis. 2d at 128.

¶17 Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense. ***Koller***, 2001 WI App 253 at ¶9. The defendant must show the alleged deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. ***Id.*** Instead, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***

¶18 Taylor first argues he was denied effective assistance of counsel because his trial counsel failed to challenge the "reputation" statement's voluntariness and admissibility as other acts evidence. He suggests his trial counsel's failure to request a ***Miranda/Goodchild*** hearing, file a motion in limine addressing the other acts argument, and his lack of preparation regarding the statement led to the trial court's decision to admit the statement. Taylor also contends his trial counsel should have requested a curative jury instruction

regarding the statement. We need not address these claims because we have already concluded the admission of the statement was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 545, 370 N.W.2d 222 (1985) (the test for prejudice in an ineffective assistance of counsel claim is substantially the same as the test for harmless error); ***Strickland v. Washington***, 468 U.S. 668, 697 (1984) (we need not address both prongs of the ineffective assistance claim if the defendant fails to make a showing on either one).

¶19 Taylor's other basis for his ineffective assistance of counsel claim was that his trial counsel failed to pursue a defense under WIS. STAT. § 972.11(2)(b)3 based on Sarah K.'s allegations of sexual assault by her father. Specifically, Taylor argues his trial counsel was ineffective because he failed to request permission from the court to pursue this evidence as required by WIS. STAT. § 971.31(11). The statute provides in actions under WIS. STAT. § 948.025, the admissibility of evidence under § 972.11 must be resolved on a pretrial motion.

¶20 We cannot say this failure constitutes ineffective assistance of counsel. While Taylor's trial counsel admitted he was aware of the accusations prior to trial, he said he believed he could not make the showing required by the statute to admit the evidence. In any event, any potential prejudice caused by the failure to make the motion is eradicated by the trial court's decision during the trial to permit Taylor's counsel to pursue this defense by questioning Sarah K.'s friends. Taylor has not demonstrated he would have received a more favorable ruling had the decision been made before the trial, and we will not speculate on the trial court's potential evidentiary rulings.

¶21 Finally, Taylor argues we should grant him a new trial because the real issue and full controversy were not fully and fairly tried. The only bases Taylor offers for this suggestion, however, are the errors we have already resolved and, therefore, we need not further consider the issue.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.