COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1036-CR **Cir. Ct. No. 00-CF-26**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. SEVERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mark A. Severson appeals a judgment, entered upon a jury's verdict, convicting him of two counts of second-degree sexual assault of a child and one count of incest with a child. Severson also appeals the order denying his motion for postconviction relief. Severson argues that he was

denied the effective assistance of trial counsel. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 In March 2000, an information charged Severson with two counts of second-degree sexual assault and one count of incest, arising from allegations that Severson had sex with his daughter, Afton S., in October and November 1998, when she was under the age of sixteen, and had engaged in an act of incest with his daughter in December 1999. After a jury trial, Severson was convicted of the crimes charged. His postconviction motion for a new trial based on ineffective assistance of counsel was denied. This appeal follows.

ANALYSIS

Ineffective Assistance of Counsel

¶3 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶4 Wisconsin employs a two-prong test to determine the validity of an ineffective assistance of counsel claim. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). To succeed on his claim, Severson must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Id.*** Further, we may reverse the order of the tests and avoid the deficient

performance analysis altogether if the defendant has failed to show prejudice. ***Id.*** at 697.

¶5 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶6 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694.

A. ***Wallerman*** Stipulation

¶7 Prior to trial, the circuit court granted the State's motion to introduce other acts evidence involving alleged sexual contact between Severson and three

stepdaughters. At trial, Afton testified about the three incidents upon which the charges were based, adding "it happened so often." It is undisputed that the only evidence of other acts was introduced through testimony of St. Croix County Sheriff Investigator Michael Wakeling, who testified about sexual contact Severson had in 1987 with one of his stepdaughters.

¶8 Severson argues that his trial counsel was ineffective for failing to pursue a ***Wallerman*** stipulation to avoid the introduction of other acts evidence. In ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), this court held that a defendant can concede elements of a crime in order to avoid the introduction of other acts evidence. Citing ***State v. DeKeyser***, 221 Wis. 2d 435, 443, 585 N.W.2d 668 (Ct. App. 1998), Severson intimates that counsel's failure to apply ***Wallerman*** constituted deficient performance and prejudiced the outcome of the trial.

¶9 In ***State v. Veach***, 2002 WI 110, ¶118, 255 Wis. 2d 390, 648 N.W.2d 447, however, our supreme court overruled ***Wallerman*** and ***DeKeyser*** to the extent they "imply that the State and the circuit court are obligated to accept ***Wallerman*** stipulations." Because the record does not indicate that the State and the circuit court would have accepted a ***Wallerman*** stipulation had it been offered, Severson has failed to prove he was prejudiced by counsel's failure to seek the stipulation.

¶10 In any event, trial counsel testified at the postconviction ***Machner*** [1] hearing that although she was aware of ***Wallerman*** stipulations, she chose not to

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

pursue one because it could be seen as inconsistent with her client's defense that nothing occurred between him and Afton. We conclude that counsel's decision not to pursue a ***Wallerman*** stipulation evinced a reasonable trial strategy.

B. Jury Selection

¶11 Severson argues that trial counsel was ineffective for failing to adequately question prospective jurors during voir dire. Citing ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), Severson claims he is entitled to automatic reversal by showing that he had to use one or more peremptory strikes against jurors who should have been stricken for cause by the court. In ***State v. Lindell***, 2001 WI 108, ¶5, 245 Wis. 2d 689, 629 N.W.2d 223, however, our supreme court overruled ***Ramos***, concluding that a defendant is not entitled to automatic reversal when he or she uses a peremptory strike to remove a juror who should have been removed for cause.

¶12 Moreover, Severson has failed to show that trial counsel's performance at voir dire resulted in the seating of a biased juror. ***State v. Koller***, 2001WI App 253, ¶14, 248 Wis. 2d 259, 635 N.W.2d 838. At the postconviction stage, Severson needed to show that if his trial counsel had asked more or better questions, those questions would have resulted in the discovery of bias on the part of at least one of the jurors who actually decided his case. ***Id.*** at ¶15. Of the various jurors that Severson now claims were potentially biased, all except one, Mary Webb, were stricken by defense counsel, the prosecutor or the court. Severson recounts that during voir dire, Webb indicated her daughter had been sexually assaulted by an uncle twenty years earlier. Webb, however, confirmed that she could "set aside that experience and be fair to all the parties and listen to all the witnesses before rendering a decision." Severson has failed to show that

Webb was either subjectively or objectively biased. Thus his assertion of possible juror bias is mere speculation. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation is insufficient to satisfy the prejudice prong of ***Strickland***). Based on Severson's failure to show prejudice, we reject his claim that he was denied effective assistance of counsel during voir dire.

By the Court.—Judgment and order affirmed.

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