COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1214-CR **Cir. Ct. No. 2005CF6471**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERMAINE L. BEAMON

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jermaine L. Beamon appeals from a judgment of conviction and order denying a postconviction motion. A jury found Beamon guilty of one count of second-degree sexual assault of a child and one count of

incest. *See* WIS. STAT. §§ 948.02(2) and 948.06(1) (2005-06).[1] On appeal, Beamon contends that the prosecutor improperly vouched for the child's credibility, and he also raises several claims of ineffective assistance of trial counsel. Because Beamon's contentions are not persuasive, we affirm.

BACKGROUND

¶2 We first set out the basic facts adduced at trial. Additional detail will be provided, as necessary, to address Beamon's specific claims of error.

¶3 The child testified that her father sexually assaulted her in June or July of 2005, in the living room of her paternal grandparents' house. The child told the jury that she was "not really sure" of the precise month of the assault. The child was fifteen years old at the time.

¶4 The child testified that she was sitting on a couch watching television, shortly after midnight, and Beamon came and sat on the floor next to her. He began talking about having sex with the child's mother. The child ignored Beamon because he was drunk. After about five minutes of talking about sex with the child's mother, Beamon "start[ed] to get on his knees" and he "put[] his hand on [the child's] vagina." Beamon told the child that "this is mine" and she "better not be having sex … [or] using this." At this point, Beamon's hand was outside of the child's shorts. The child did not say anything, and "just tried to push [Beamon's] hand away … with both of [her] hands."

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted. Because of the nature of Beamon's crimes, we are not identifying the victim. We will also shield the identity of various trial witnesses.

¶5 Beamon then moved his hand away and "start[ed] to kiss" the child "on [her] lips." Beamon "[p]ut his tongue in [the child's] mouth," and she "[s]tarted pushing his face, telling him to stop." The child did not yell for her grandparents who were in the room adjacent to the living room because she was "scared" of Beamon. Beamon stopped kissing the child and he then "unzipped" her shorts and "just tossed them on the floor." The child was "[f]ighting with [Beamon and] pushing his hands away." She told Beamon to stop but did not "call[] for [her] grandma because she couldn't do nothing. She wouldn't have been able to."

¶6 After Beamon removed the child's shorts and pulled down her underwear, he put his finger in her vagina and "[m]oved it around a little bit" while she was "[b]egging him to stop." Beamon then took the child's underwear completely off, threw them on the floor, put her legs around his shoulders and "did oral sex on [her]." The child testified that she told Beamon to stop and asked why he was doing it, and he replied, "this is how it's supposed to feel." Beamon then stopped, and the child got off the couch and retrieved her underwear and shorts.

¶7 The child's grandmother then came into the living room and the child went into the bathroom. The child testified that her grandmother and Beamon were arguing, and that her grandmother told him to leave the child alone. Beamon then left the living room and went to the basement. The child did not tell her grandmother what had happened because she "didn't know what to say [or] what to do."

¶8 The child did not tell anyone about the assault because she was "scared" and "didn't know what to do." On September 5, 2005, her aunt asked her why she was always sad. Her aunt asked her if somebody was touching her, and

the child "started to cry a little bit." The aunt then started naming men in the child's life, and "when [the aunt] got to [Beamon], I started to cry more, and she started to cry."

¶9 The child's aunt, Stacy M., testified that the child had been depressed and withdrawn for ten years. At a family gathering on September 5, 2005, she took the child for a walk to see if the child would tell her what was wrong. Stacy M. asked the child if somebody was touching her, and the child replied yes, but did not say who was touching her. Stacy M. then started naming possible persons. When Stacy M. mentioned Beamon's name, the child "just started crying, and she just fell down on the concrete." Later in the day, Stacy M. told the child's mother what she had been told by the child, and police were called a few days later.

¶10 Detective Tammy Tramel testified that she spoke with the child on September 9, 2005, at a sexual assault treatment center. Detective Tramel recounted what the child had told her during that interview. She also testified that she had received sexual assault training, that part of her training concerned delayed reporting, and that a delay in reporting would not be a reason to disbelieve a victim.

DISCUSSION

A. Prosecutorial Argument

¶11 Beamon first argues that the prosecutor improperly vouched for the child's credibility during closing argument. Because Beamon's trial attorney did not object to the argument, the contention on appeal is couched in terms of "plain error." *See* ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115

(Under the plain error doctrine, this court "may review error that was otherwise waived by a party's failure to object properly or preserve the error for review as a matter of right."). Because the prosecutor's argument was not improper, we reject Beamon's position.[2]

¶12 An attorney is allowed considerable latitude during closing argument. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). "The line between permissible and impermissible final argument is not easy to [delineate] and is charted by the peculiar circumstances of each trial. Whether the prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial." ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The line of demarcation is thus "drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). So long as a prosecutor's argument relates to the evidence, "[s]ubstantial latitude is given, and we will not throttle the advocate by unreasonable restrictions." ***Id.*** at 456. A prosecutor may comment on the credibility of witnesses so long as the comment is based upon evidence presented. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶13 Beamon complains that, although the "prosecutor did not explicitly state he believed [the child], … [the prosecutor's] comments would leave no doubt

[2] Beamon includes his attorney's failure to object to the prosecutor's closing argument in the ineffective assistance of counsel portion of his brief. For the reasons set forth above, we conclude that the prosecutor's closing argument was not improper and, therefore, trial counsel cannot be faulted for not objecting. *See* ***State v. Traylor***, 170 Wis. 2d 393, 405, 489 N.W.2d 626 (Ct. App. 1992).

in the jury's mind that [the prosecutor] thought [the child] was telling the truth." To examine Beamon's argument, we must consider the prosecutor's comments "in the context of the total trial." *See* ***Smith***, 268 Wis. 2d 138, ¶23.

¶14 Beamon accurately portrays the outcome of this trial as hinging on credibility. If the jury believed the child's account of the assault, then Beamon was guilty. However, if the jury concluded that the child was not credible and disbelieved her, then Beamon would have been found not guilty. With that in mind, we set forth the specifics of the prosecutor's closing argument:

> We said, at the beginning of the trial, this is a credibility case. At the end of the trial, it is a credibility case. Do you believe her?
>
> ….
>
> Who I believe doesn't matter; who [defense counsel] believes, doesn't matter; who the judge believes, doesn't matter.
>
> The 12 of you, who ultimately retire and deliberate, you judge credibility. Do you believe her? Because at the heart of this case, it is [the child].
>
> ….
>
> It all boils down to her, and there are certain factors you can consider, and, in fact, you should consider in determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:
>
> Whether the witness has an interest or lack of interest in the result of the trial.
>
> In other words, what does she have to gain? What did she have to gain, in September of 2005, by lying to her aunt? What does she have to gain, 18 months later, by coming to court and lying in front of 13 people she doesn't know? She has nothing to gain. She has a lot to lose, but nothing to gain.

Also, consider the witness's conduct, appearance and demeanor on the witness stand. I mean, this is basically this:

The 12 of you who ultimately deliberate have lived lives, in your lives people tell you stuff, people who you don't know and you just decide you believe 'em.

A lot of it is just this internal lie detector, how do they come across. That is really what you have to do. Did she appear she was lying, was this all an act? Was she an actress or was she telling the truth, and was the emotion and the pain heartfelt because it is her father?

I mean, there is no evidence that they had a terrible relationship, it is her father. This wasn't an act.

You would also consider the clearness or lack of clearness of the witness's recollection. You know, the only thing that is not clear, and it is not only [the child], it is everybody's dates.

Even [the child's grand]mother, I mean on the stand this morning, she was positive it was July 15th.

But in September of '05, she is like, the summer. She doesn't know [the exact date].

….

And although [the child's grand]mother says something on the witness stand, now knowing what her son is charged with, it is not what she said to Detective Tramel. She walked out of her bedroom, she saw them together, she said, leave that girl alone.

You can consider other factors, reasonableness, the apparent intelligence.

Another one, possible motives for falsifying. What motive does she have to lie on her father? What possible reason? What motive has been shown? There hasn't been any. What does she have to gain? Nothing.

….

There is no magic way for you to evaluate the testimony. Instead, you should use your common sense and experience, in everyday life you determine for

> yourselves the reliability of things people say to you. You should do the same here.
>
> We don't use lie detectors. We rely upon people who have lived lives as lie detectors, that's how the system works.
>
> The 12 of you who deliberate are the lie detectors.
>
> If you found [the child] is lying, there is only one, two decisions, you have to acquit [Beamon], you simply do if she lied.
>
> But if you believed her, and there is no reason for you to find that she is lying, you have to find him guilty of both counts.
>
> Just watching her, this wasn't an act. She is not an actress. This wasn't a lie. She --
>
> This is her father she has known all her life. Her pain was evident and it is pain because he did something that nobody should experience.
>
> When she told you what happened, she is telling you the truth. He did have sexual contact with her and he should be found guilty of both crimes.

And in rebuttal, after responding to Beamon's arguments why the child should not be believed, the prosecutor concluded his argument: "[y]ou can consider what she said, how she came across, she is not lying. She is simply not lying, you can't get there. He committed two crimes and he should be found guilty."

¶15 The prosecutor's argument was not improper. The prosecutor never suggested that the jury assess Beamon's guilt based upon something other than the evidence presented at trial. The prosecutor merely reviewed the factors upon which the jury should judge witness credibility and applied those factors to the child's testimony. "A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***Adams***, 221 Wis. 2d at 19. Viewing the

prosecutor's entire argument in the context of the evidence, we conclude that the prosecutor did not cross the line into impermissible argument.

B. Ineffective Assistance of Trial Counsel

¶16 Beamon next claims several instances of ineffective assistance of counsel. We first set forth the controlling legal principles and then consider Beamon's specific claims of error.

¶17 In order to establish that he did not receive effective assistance of counsel, Beamon must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer'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." ***Strickland***, 466 U.S. at 687. Even if Beamon can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *See* ***id.*** Stated another way, to satisfy the prejudice prong, Beamon "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *See* ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶18 In assessing Beamon's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice

present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶19 Beamon first complains that his trial counsel "failed to properly investigate all the facts surrounding the case." He points to his counsel's failure to hire a private investigator to interview Stacy M. Beamon contends that because of poor preparation, counsel was surprised by the answer given when he asked Stacy M. what the child had told her about what Beamon had done to her. Stacy M. replied, "she said, that he will come home drunk a lot. And that I don't know exactly, but something happened in the living room with her and her father, if he exposed himself to her. … [o]r tried some things." In follow-up questions on re-direct, the State probed what Stacy M. meant by "tried some things," and she replied:

> You know what? It has been -- It has been a year-and-a-half, to be honest with you, I don't know if it was, he tried something, he exposed hisself [sic], do I remember exactly what she said? No. … I do not. But I know she was -- she gave some -- something to the fact that he tried to do something sexual with her.… Specifics, no, I do not know specifics.

In his brief, Beamon states that Stacy M. "testified that [the child], on another occasion said that [Beamon] had exposed himself to her. If trial counsel had hired an investigator to interview [Stacy M.], this damaging testimony would have never surfaced."

¶20 Beamon misreads Stacy M.'s testimony. As can be seen from the above excerpt, Stacy M. did not testify that the child told her that Beamon had exposed himself at some other point in time. Rather, Stacy M. responded to

Beamon's counsel's question aimed at finding out precisely what the child had told her about the incident in the living room. Moreover, as pointed out by the State in its brief, Stacy M.'s account of the child's description of the incident, which included Beamon's exposing himself, was at odds with the child's trial testimony and with the description of the incident given by the child to Detective Tramel. Beamon's counsel used that discrepancy in his closing argument to the jury as a reason why the child should not be believed. That the jury chose to believe the child despite counsel's argument does not render counsel ineffective. *See* ***Strickland***, 466 U.S. at 689 (When considering a claim of ineffective assistance of counsel, "every effort [should] be made to eliminate the distorting effects of hindsight."). Beamon has shown neither deficient performance nor prejudice.

¶21 Beamon next asserts that his trial counsel was ineffective because he did not object to any of the State's questions during trial. Beamon claims that the State posed leading questions to the child during direct examination. Although Beamon points to three lines of inquiry that he believes included leading questions, he does nothing more to develop his argument. He cites to no case law and does not indicate how the form of the questions prejudiced him. We will not develop Beamon's argument for him, *see* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987), and we decline to review this issue, as inadequately briefed, *see* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶22 Beamon next faults his trial counsel for not objecting when Stacy M. "vouched for the truthfulness of [the child's] allegations based on 'being a female.'" That is the totality of Beamon's argument. The issue is inadequately briefed, and we decline to review it. *See* ***id.***

¶23 Beamon next complains that his trial counsel did not object to Detective Tramel's testimony regarding the delayed reporting of sexual assaults. According to Beamon, Detective Tramel improperly commented on the child's credibility. Whether a witness has improperly testified as to the credibility of another witness presents a question of law which we review independently. ***State v. Huntington***, 216 Wis. 2d 671, 697, 575 N.W.2d 268 (1998). We reject Beamon's contention.

¶24 Beamon takes issue with the following portion of Detective Tramel's testimony, on direct examination:

> Q: You had some training about sexual assaults not being reported right away, correct?
>
> A: Well, yeah.
>
> …
>
> Q: Well, here you have a girl who is saying her father assaulted her, correct?
>
> A: Yes.
>
> Q: But there is a two -- two to three-month delay in reporting, correct?
>
> A: Yes.
>
> Q: In your experience and training, that isn't a reason just to disbelieve her, the delaying in reporting?
>
> A: No.
>
> Q: Why not?
>
> A: Because there is -- that's usually --
>
> That usually comes with the sexual assault. It is not reported right away, and especially from a child and a teen-ager and, you know, this being her biological father, you know, it would divide the family; people, you know, wouldn't believe her.

> And usually, that's why, you know, people don't come out right away and say, talk about these things.

¶25 It is well-settled that a witness may not vouch for the truthfulness of another witness. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). However, an expert witness may testify about whether the victim's behavior is consistent with the patterns and characteristic behaviors of victims of the same type of crime. ***State v. Jensen***, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988). An expert witness may testify about a victim's delayed reporting of a sexual assault, particularly in a family context. *See* ***Huntington***, 216 Wis. 2d at 697-98.

¶26 Detective Tramel did not vouch for the child's credibility. She merely offered her expert opinion that the child's delay in telling anyone about the sexual assault was consistent with behavior shown by other victims of childhood sexual abuse. Detective Tramel's testimony was not improper, *see* ***id.*** at 698, and, therefore, Beamon's trial counsel cannot be faulted for not objecting, *see* ***State v. Traylor***, 170 Wis. 2d 393, 405, 489 N.W.2d 626 (Ct. App. 1992).

¶27 Beamon also faults his trial counsel for not objecting to Detective Tramel's "qualifications to give opinion testimony." The record defeats Beamon's contention. Detective Tramel testified that she had worked in the Sensitive Crimes Division of the Police Department, had attended "a couple of trainings" related to the investigation of sexual assaults, and that those trainings included the subject of delayed reporting. We agree with the State that Beamon's brief does not adequately address why that level of training should be held to be inadequate to offer opinion testimony. We decline to further address this issue. *See* ***Pettit***, 171 Wis. 2d at 647.

¶28 Beamon contends that his trial counsel was ineffective in his cross-examination of Detective Tramel. He does not, however, elaborate on what counsel should have, but did not, ask. Therefore, the argument fails. *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272 ("'A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.'") (citation and bracketing omitted)).

¶29 Beamon next faults his trial counsel for not objecting to the State's motion to amend the date range identified in the Information. The Information alleged that the crimes took place "[i]n June, 2005." At the close of evidence, the State moved to amend the Information to state "June or July 2005."

¶30 Counsel was not ineffective. "[W]here the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged. Time is not of the essence in sexual assault cases." ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988) (citations omitted). Thus, the date allegation in the Information was not a critical matter. Moreover, the record shows that Beamon knew that the State would be alleging that the crimes took place in *either* June or July 2005. At the preliminary hearing, the child testified that Beamon assaulted her "[e]nd of June, beginning of July," 2005. Thus, from the very beginning of the prosecution, Beamon was aware of the date range relied upon by the State. WISCONSIN STAT. § 971.29(2) allows the "amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." Because he knew of the two-month time frame since the preliminary hearing, Beamon could not credibly claim that an amendment to the Information would be prejudicial. Thus,

Beamon's counsel was not ineffective when he did not object to the State's motion. *See* ***Traylor***, 170 Wis. 2d at 405.

¶31 Lastly, Beamon. complains about his counsel's closing argument, suggesting that counsel "squandered" a "rich treasure trove of discrepancies from which to demonstrate reasonable doubt." When assessing the performance of trial counsel, "every effort [should] be made to eliminate the distorting effects of hindsight." *See* ***Strickland***, 466 U.S. at 689. We have reviewed counsel's closing argument in which he pointed out various inconsistencies within the child's testimony and between her testimony and the testimony of other witnesses. That the argument failed to convince the jury does not render counsel's performance deficient. *See* ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973) (Effective representation should not be equated with a not-guilty verdict.).

By the Court.—Judgment and order affirmed.

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