COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2377-CR **Cir. Ct. No. 2005CF70**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES C. STUDENEC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. James Studenec appeals a judgment of conviction for five counts of second-degree sexual assault by a probation officer and five counts of misconduct in public office. Studenec argues his trial counsel was ineffective because he failed to determine the number of prior convictions for

three witnesses and failed to request the pattern jury instruction concerning prior convictions. Studenec also argues the circuit court improperly denied his motion for mistrial based on a ***Haseltine*** violation.[1] We reject Studenec's arguments and affirm.

BACKGROUND

¶2 Studenec, a probation and parole agent, supervised Dani Jo McLean on probation for about one year in 2004 to 2005. Approximately three months after her discharge, McLean encountered Studenec in his car outside her apartment. Four days later, she contacted police and reported prior unwanted sexual contact with Studenec.

¶3 At trial, McLean testified that at her second meeting with Studenec he noted she had been arrested for prostitution twenty years before. He then asked her sexually explicit questions about that work and her sexual preferences. At subsequent meetings in the office and at McLean's home, Studenec made further sexual comments and touched McLean's breasts and buttocks. At one meeting, when McLean wore a skirt without underwear as Studenec had instructed, he placed her hand on his crotch. McLean stated she felt something hard, like a small erection. McLean testified Studenec also made sexual comments during the encounter outside her apartment days before she contacted the police.

¶4 Studenec testified McLean called on numerous occasions and repeatedly came into the probation office without appointments, even when he was not there. He denied ever touching McLean and explained he spoke to her outside

[1] *See* ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

of her apartment because he was looking for her roommate, who Studenec was currently supervising. He denied saying anything sexual to McLean that day.

¶5 Dr. Ronald Williams testified Studenec was morbidly obese, weighing between 375 and 400 pounds. Williams told the jury Studenec had numerous medical problems, suffered erectile dysfunction, and that Williams had difficulty locating Studenec's penis in the surrounding tissue. The State's doctor, Richard Roach, testified Studenec's condition is called concealed penis. Roach opined that, despite his medical conditions, Studenec had at least a fifty percent chance of having an erection. Studenec's wife testified they had attempted sexual intercourse once in 2002, but Studenec was unable to sustain an erection and became ill. The jury convicted Studenec on all ten counts, consisting of five sexual assault charges and five misconduct in office charges. Following the circuit court's denial of his postconviction motion, Studenec now appeals.

DISCUSSION

¶6 A defendant alleging ineffective assistance must demonstrate that counsel's performance was deficient and resulted in prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Koller***, 2001 WI App 253, ¶7, 248 Wis. 2d 259, 635 N.W.2d 838. To establish deficient performance, the defendant must demonstrate counsel's act or omission was "objectively unreasonable." ***State v. Oswald***, 2000 WI App 2, ¶63, 232 Wis. 2d 62, 606 N.W.2d 207. Thus, the court may rely on reasoning or a strategy that was never actually considered, or was even disavowed, by trial counsel. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶24, 31, 246 Wis. 2d 648, 630 N.W.2d 752. Prejudice exists if, absent the deficient performance, there is a reasonable probability of a different outcome. ***Koller***, 248 Wis. 2d 259, ¶9.

¶7 Studenec argues his trial counsel was ineffective for failing to impeach three of the State's witnesses with the correct number of their prior convictions. Linda Dain and Melissa Wales each testified they had two criminal convictions. Actually, Dain had four and Wales had five. McLean testified she had three convictions. Studenec asserts McLean also had more than she testified to, but he failed to establish this at the postconviction hearing. He therefore forfeited that argument on appeal. *See* ***State v. Elm***, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996).

¶8 Trial counsel explained that after discussing the issue with the prosecutor he stipulated to the number of prior convictions each of the women would testify to. Rather than the number of convictions, the women would testify to their number of prior cases.[2] Counsel agreed to a compromise believing that if the parties submitted the matter to the court, it would likely determine that not all of the witness's prior convictions could be used for impeachment.

¶9 The State contends counsel's strategy was objectively reasonable because circuit courts may conduct a balancing test and limit the number of prior convictions that may be used to impeach a witness. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶21, 270 Wis. 2d 62, 676 N.W.2d 475. Neither Studenec nor the State, however, addresses the factors discussed in ***Gary M.B.*** Regardless, Studenec has not demonstrated a reasonable probability that if Dain and Wales had testified to four and five prior convictions the trial would have had a different outcome.

[2] Dain and Wales each had two prior criminal cases, with one or both cases having multiple charges.

¶10 Studenec argues the failure to fully impeach the witnesses with their prior convictions was prejudicial because the case turned on credibility. Studenec does not, however, tell us who Dain or Wales were, what they testified to, or why their testimony was important. This alone forecloses Studenec's argument. Further, the State responds that the jury knew both Dain and Wales had been on probation. Dain testified she was arrested and jailed while on probation. Wales testified that while on probation she tested positive for marijuana, was in jail, and her probation was being revoked. We are not convinced the jury would have found the witnesses significantly less credible if it had known they had four or five convictions rather than two, especially given its additional knowledge of their criminal histories.

¶11 In a related argument, Studenec argues trial counsel was ineffective for failing to request the pattern jury instruction on prior convictions, which states: "Evidence has been received that [some] of the witnesses in this trial [have] been [convicted of crimes]. This evidence was received solely because it bears upon the credibility of the witness. It must not be used for any other purpose." WIS JI—CRIMINAL 325 (Apr. 2001). Trial counsel testified he intended to request the instruction but forgot.

¶12 Although nothing prevented Studenec's attorney from requesting the limiting instruction, it is typically requested by the party against whom impeaching conviction testimony was used. In this case, it was the State's witnesses who were impeached. Thus, the failure to request the limiting instruction did not harm and, perhaps assisted, Studenec's defense. He argues, however, that the instruction would have informed the jurors that prior convictions render a witness unreliable. But, as to any jurors who believed witnesses are less credible because they have been convicted of crimes, the limiting instruction

would not have told them anything new. The instruction does not inform jurors that they *must* find witnesses with prior convictions less credible. Counsel's failure to request it was therefore not prejudicial.

¶13 Studenec also argues the circuit court should have granted a mistrial after the State elicited a police detective's testimony suggesting McLean was truthful when she reported the sexual assaults. "In Wisconsin, a witness may not testify 'that another mentally and physically competent witness is telling the truth.'" ***Elm***, 201 Wis. 2d at 458 (quoting ***Haseltine***, 120 Wis. 2d at 96). Thus, it has been held improper for a police officer to testify that the complaining witness was being totally truthful with the officer, and for a psychiatrist to give his opinion that there was no doubt whatsoever that a child was an incest victim. ***Id.*** (citing ***State v. Romero***, 147 Wis. 2d 264, 277, 432 N.W.2d 899 (1988), ***Haseltine***, 120 Wis. 2d at 95-96).

¶14 The testimony here was as follows:

> Q: Was she able to obtain eye contact with you?
>
> A: Yes.
>
> Q: And is that an important fact from your standpoint?
>
> A: Yes, this is.
>
> Q: Why is that?
>
> A: Generally speaking, if somebody maintains eye contact, they normally are being honest about the situation.

Studenec's attorney then objected and moved to strike and for a mistrial. The court responded: "The answer will be stricken. Your motion to strike is granted. And I'll hear you at another time regarding your motion." The prosecutor then proceeded questioning the detective:

> Q: You're trained to look for certain things when you interview people?
>
> A: Correct.
>
> Q: Okay. Is eye contact one of them?
>
> A: Yes, it is.
>
> Q: What are the other things you're trained to look for?
>
> A: Body language, how they hold themselves, actually what they –

Counsel then renewed his objection and the court dismissed the jury for lunch. The court denied the motion for a mistrial, opining that the testimony was not so direct and prejudicial as to warrant that remedy. Upon returning, the court instructed the jury:

> The Court did strike a response by Detective Rozga regarding information that had been supplied to her by Dani Jo McLean. No witness is permitted to testify as to the truthfulness of another witness. You're the sole judges of the credibility, that is the believability of the witnesses, and the weight to be given their testimony. That information was stricken. You're to disregard it. And with that admonition, we will pick up from there.

Additionally, at the end of trial the court instructed the jurors they were the sole judges of credibility and the facts and were to disregard all stricken testimony.

¶15 The decision whether to grant a mistrial lies within the sound discretion of the trial court. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.*** We will not reverse the denial of a motion for mistrial absent a clear showing of an erroneous exercise of discretion. ***Id.*** Where the trial court gives the jury a curative instruction, we may conclude the instruction erased any possible

prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition. ***Genova v. State***, 91 Wis. 2d 595, 622, 283 N.W.2d 483 (Ct. App. 1979). Here, the court immediately struck the objectionable testimony, followed up with a specific, strongly worded cautionary instruction, and then reminded the jury at the close of trial to disregard all stricken testimony. It also considered Studenec's mistrial motion and determined the testimony was not prejudicial enough to warrant a mistrial. We are satisfied the court did not erroneously exercise its discretion.

By the Court.—Judgment affirmed.

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