COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2008AP1606 **Cir. Ct. No. 2004CF380**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD HELMUT WAGNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

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

¶1 PER CURIAM. Ronald Wagner appeals a judgment convicting him of second-degree sexual assault and an order denying his motion for postconviction relief. Wagner argues the trial court improperly denied his requests for substitution of judge and recusal and denied him his constitutional right of

self-representation. Wagner also argues the State violated his right to due process by destroying and suppressing evidence favorable to him. Additionally, Wagner contends he received ineffective assistance from his trial attorneys. Finally, Wagner urges us to exercise our power of discretionary reversal, pursuant to WIS. STAT. § 752.35.[1] We reject Wagner's arguments and affirm.

BACKGROUND

¶2 An Information charged Wagner with second-degree sexual assault. At trial, Christopher Rosenberg testified that on August 8, 2004, he and Wagner were inmates in the St. Croix County Jail. At 6:30 p.m., the other inmates in their cell block went to church services, leaving Rosenberg and Wagner alone. Rosenberg testified that he went to the bathroom at about 7:30 p.m. While Rosenberg was urinating, Wagner began fondling Rosenberg's penis. Wagner then penetrated Rosenberg anally. After Wagner left the room, Rosenberg used an intercom system to summon guards and called his girlfriend and told her he had been sexually assaulted. Rosenberg testified he did not consent to any sexual contact with Wagner.

¶3 Three days later, Sheila Pelzel, a sexual assault nurse, examined Rosenberg. Pelzel testified that, while performing an anal examination of Rosenberg, she observed a half-inch superficial laceration that was one to three days old. Pelzel concluded the laceration was consistent with a sexual assault like the one Rosenberg described.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 The jury found Wagner guilty of second-degree sexual assault. Wagner received a twenty-two year sentence, consisting of twelve years' initial confinement and ten years' extended supervision.

¶5 On July 18, 2005, Wagner, pro se, filed a motion to compel postconviction discovery and a motion to dismiss the case with prejudice or for a new trial. Wagner alleged ineffective assistance of counsel, failure by the State to provide discovery and preserve exculpatory evidence, denial of witnesses, presentation of false or perjured testimony, failure to hear a petition for writ of habeas corpus prior to sentencing, denial of equal protection, and newly discovered evidence. The court delayed consideration of Wagner's pro se motions after postconviction counsel was appointed for him. On August 26, 2005, Wagner again filed postconviction motions, alleging that his trial attorneys were ineffective and that the trial court erroneously exercised its discretion and violated his right to self-representation. After an evidentiary hearing, the trial court denied Wagner's requests for postconviction relief.

¶6 Wagner filed a notice of appeal. Wagner's appellate counsel subsequently moved this court to withdraw, on the grounds that Wagner wanted to proceed pro se. After Wagner advised us that he desired to represent himself, we granted counsel's motion to withdraw and ordered Wagner to file his appellate brief by June 12, 2006. On July 5, 2007, we granted Wagner's motion to dismiss his appeal and reopen his postconviction rights, after Wagner argued he needed to supplement his postconviction motion with issues his counsel had failed to raise.

¶7 Following remittitur, Wagner filed a demand for substitution of trial judge, citing WIS. STAT. § 801.58(7) for the proposition that he had "twenty (20) days from the date of the remittitur to request a substitution of judge …." He also

argued the trial judge was required to recuse himself because he had "become a witness in the returning action, as he was directly involved in the denial of Wagner's right to proceed pro se prior to trial." The trial court denied Wagner's request for substitution or recusal.

¶8 On December 10, 2007, Wagner filed a supplemental postconviction motion, which the trial court denied after evidentiary hearings. Wagner now appeals the judgment of conviction and the order denying his supplemental motion for postconviction relief.

DISCUSSION

I. Substitution/recusal of trial judge

¶9 Wagner first argues the trial court improperly denied his request for substitution of trial judge. Wagner cites WIS. STAT. § 801.58(7) for the proposition that he was entitled to request substitution within twenty days from the date of remittitur. Subsection 801.58(7) provides:

> If upon an appeal from a judgment or order or upon a writ of error *the appellate court orders a new trial or reverses or modifies the judgment or order* as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the remittitur in the trial court whether or not another request was filed prior to the time the appeal or writ of error was taken. (Emphasis added.)

¶10 Wagner's reliance on WIS. STAT. § 801.58(7) is misplaced. The statute clearly states that a substitution of judge may be requested when an appellate court (1) orders a new trial, or (2) reverses or modifies a judgment or order in a manner such that further proceedings in the trial court are necessary. Prior to Wagner's request for substitution, we did neither. We merely granted

Wagner's request for voluntary dismissal of his first appeal and reinstated his postconviction rights. Our intent was to allow Wagner to raise additional issues that his postconviction counsel had neglected, so as to "avoid a piecemeal appeal." Therefore, Wagner was not entitled to request substitution of trial judge under WIS. STAT. § 801.58(7).

¶11 Wagner also argues the trial judge was required to recuse himself following remittitur because he had "become a material witness in the case." Wagner contends that the trial court, by requiring Wagner to retain counsel, became a material witness on the issue of whether Wagner's constitutional right of self-representation was violated. The trial judge refused to recuse himself, finding that "the issues raised by [Wagner] regarding his ability to proceed pro se are a matter of record and can be decided based on the record."

¶12 WISCONSIN STAT. § 757.19(2)(b) provides that a judge "shall disqualify himself or herself from any civil or criminal action" if he or she is "a party or a material witness …." The interpretation of § 757.19(2)(b) is a question of law that we review independently. *See* ***State v. Hampton***, 217 Wis. 2d 614, 619, 579 N.W.2d 260 (Ct. App. 1998).

¶13 WISCONSIN STAT. § 757.19(2)(b) did not require the trial judge to recuse himself in this case. The fact that a judge hears and sees events occurring in the courtroom does not transform the judge into a "witness." In ***Hampton***, 217 Wis. 2d at 620, we observed:

> A trial court's observations are inherent to its role as presiding judge. The trial court, as a matter of course, considers the demeanor of witnesses in making its legal and factual rulings. The trial court sees and hears everything that occurs before it. The fact that the trial court, in a technical sense, "witnesses" the actions of the jurors, the testifying witnesses, the lawyers and the parties does not

> transform the trial court into a "material witness" pursuant to § 757.19(2)(b), STATS.
>
> The trial court remains the judge, presiding over the proceeding and making rulings based on the evidence and argument before it. Although judicial rulings may be grounds for appeal, they do not necessarily form the basis for recusal. *See* ***Liteky v. United States***, 510 U.S. 540, 555, [114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474] (1994).

Thus, § 757.19(2)(b) did not require the trial judge in this case to recuse himself, because he was not a "witness" at all. The judge's decision to appoint counsel for Wagner did not make him a "material witness" when Wagner later challenged that decision in a postconviction motion. Rather, he continued in his role as presiding judge, ruling on Wagner's motion based on the record.

II. Right to self-representation

¶14 Wagner next argues the trial court violated his right to self-representation by requiring him to retain an attorney to represent him at trial. Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to conduct his or her own defense. ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). However, both constitutions also guarantee a defendant the right to counsel. ***Id.*** at 201-03. The interaction of these two rights "create[s] somewhat of a dilemma for the trial judge who is confronted with the unusual defendant who desires to conduct his own defense." ***Id.*** at 203 (quoted source omitted). Thus, "[w]hen a defendant seeks to proceed pro se, the [trial] court must ensure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.*** If these conditions are satisfied, the court must allow the defendant to proceed without an attorney. ***Id.*** at 203-04.

¶15 However, a defendant's waiver of the constitutional right to counsel does not trump the inherent power of the trial court to appoint counsel. ***State v. Lehman***, 137 Wis. 2d 65, 76, 403 N.W.2d 438 (1987). In ***Lehman***, after the defendant decided to proceed pro se, the trial court appointed standby counsel to advise the defendant during trial. ***Id.*** at 69-72. The supreme court concluded the trial court had discretion to appoint standby counsel because the function of standby counsel is to serve the needs of the court, not the defendant. ***Id.*** at 76-78. The trial court's decision to appoint standby counsel was proper because the court was concerned that, without standby counsel, the trial would not proceed in an orderly fashion. ***Id.*** at 78.

¶16 Wagner claims that after the trial court ruled it would allow him to proceed pro se, it impermissibly terminated his right to self-representation by requiring him to retain Attorney Sonderhouse as trial counsel. Wagner had planned to use Sonderhouse as a "consultant" during the trial. However, Wagner argues that the trial court, rather than appointing Sonderhouse as standby counsel, "required Sonderhouse to file a Notice of Retainer … and Sonderhouse was informed that Wagner could not represent himself, even though [Sonderhouse] was to act as standby counsel."

¶17 The record belies Wagner's contentions. At a January 13, 2005 hearing, the trial court noted that Wagner had waived his right to an attorney, but the court nevertheless sought to appoint standby counsel because it was concerned about "legal procedures" during the trial. The following exchange then took place between the court and attorney Dunlap, counsel from the public defender's office:

> MR. DUNLAP: *Mr. Wagner has advised me that he has retained counsel*, that his attorney is intending to be here on Tuesday for the trial on Wednesday and Thursday. The attorney's name – can I have permission to tell the judge?

> MR. WAGNER: (Indicating)
>
> MR. DUNLAP: – is Attorney Ronald Sonderhouse from Brookfield.
>
> THE COURT: Okay.
>
> MR. DUNLAP: And I've called Mr. Sonderhouse's office. I have been advised by his secretary that she was aware of negotiations that had been taking place between Mr. Wagner and Mr. Sonderhouse, but she wasn't aware if those negotiations concerning the retainer, I imagine, have been finalized, and that I needed to talk to Mr. Sonderhouse.
>
> Mr. Wagner says that – he's advised me that those retainer negotiations have been finalized as of yesterday and that Mr. Sonderhouse had been giving him some advice over the phone, and that was being used by him at this hearing, I believe, that the Court had yesterday.
>
> *So I'm telling the Court, with Mr. Wagner's permission, that he has retained an attorney* who is ready to be representing him on Wednesday. (Emphasis added.)

Thus, after the trial court made the discretionary decision to appoint standby counsel for Wagner, Dunlap informed the court that Wagner had "retained" Sonderhouse to represent him at trial. Dunlap made this representation in Wagner's presence, and Wagner did not dispute it. As a result, Wagner cannot now complain that the court violated his right to self-representation by allowing Sonderhouse to represent him at trial.

III. Destruction of evidence

¶18 Wagner next argues the State violated his right to due process by failing to preserve evidence. A defendant's due process rights are violated if the State: "(1) failed to preserve evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (1994). Whether a due

process violation has occurred is a question of constitutional fact subject to independent review. ***State v. Sturgeon***, 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999). However, we will not set aside the underlying historical facts as found by the trial court unless clearly erroneous. ***Id.***

¶19 Wagner argues the State failed to collect evidence of the sexual assault for three days and destroyed recordings of phone calls made from the St. Croix County Jail. However, despite pages of elaborate argument, Wagner fails to explain adequately why this evidence would have been exculpatory. Wagner has not shown that the evidence would have had any bearing on the outcome of the trial. We agree with the trial court that "Wagner speculates only what the alleged evidence might have shown; a far cry from exculpatory."

¶20 Even if the evidence were potentially exculpatory, Wagner has not shown that the State acted in bad faith by failing to preserve it. Wagner has not presented any evidence that the State acted in bad faith by failing to conduct a sexual assault examination of Rosenberg until three days after the alleged assault. Nor has Wagner presented any evidence that the State acted in bad faith by failing to preserve recordings of phone calls made from the St. Croix County Jail during August 2004. According to sheriff Dennis Hillstead, the jail switched phone service providers on October 3, 2006, resulting in a loss of all phone calls recorded before that date. Hillstead testified that it was his decision to change the jail's phone service provider and that he was unaware that the change would result in the loss of any recordings. Wagner has not presented any evidence that Hillstead's decision to change phone providers was in any way motivated by a bad faith desire to destroy evidence.

IV. Failure to disclose evidence

¶21 Wagner next contends that the State suppressed evidence favorable to him and that the result of his trial would have been different had the State disclosed the evidence. Under the Fourteenth Amendment, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). To establish a ***Brady*** violation, a defendant must make three showings: (1) that the State "suppressed" the evidence in question; (2) that the evidence in question was "favorable" to the defendant; and (3) that the evidence was "material" to the determination of the defendant's guilt or punishment. ***Id.*** "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (citation omitted). We independently review whether a due process violation has occurred, but we accept the trial court's findings of historical fact unless clearly erroneous. ***Sturgeon***, 231 Wis. 2d at 496.

¶22 Wagner argues the State violated his right to due process by failing to disclose previous statements and recorded phone calls made by Rosenberg, probation and parole records, jail movement records, and police reports. However, Wagner has wholly failed to show that any of this evidence would have been material to his case. Much like his destruction of evidence claim, Wagner has not demonstrated a reasonable probability that the evidence the State allegedly failed to provide would have changed the outcome of his trial. We agree with the trial court that "even if there were any nondisclosure, [Wagner] was not deprived of a fair trial."

V. Ineffective assistance of counsel

¶23 Wagner further contends all three of his trial attorneys were ineffective. An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We do not disturb the trial court's findings of fact unless they are clearly erroneous, but we independently review whether counsel's conduct amounts to ineffective assistance. ***Id.***

¶24 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A showing of prejudice requires more than speculation; the defendant must affirmatively prove prejudice. ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). We need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶25 Wagner alleges that his first trial counsel, attorney Lamb, was ineffective by failing to: (1) interview "various witnesses;" (2) request state public defender hours for a private investigator hired by Wagner; (3) file any discovery motion; and (4) provide his file to Wagner's next attorney. Lamb only served as Wagner's attorney for a brief period of about two months. That Lamb did not interview witnesses or file a discovery motion during that short time does not

constitute deficient performance. Furthermore, Lamb testified that he did not request state public defender hours for Wagner's private investigator because Wagner "indicated that [his] family would pay [her]." Lamb also testified that he hand-delivered his file to Wagner's next attorney. Like the trial court, we conclude Lamb's performance was not deficient. Additionally, Wagner has failed to demonstrate how any of Lamb's allegedly deficient acts prejudiced him. As a result, we conclude Wagner did not receive ineffective assistance from Lamb.

¶26 Wagner next argues his second trial counsel, attorney Schutte, was ineffective by failing to: (1) file a motion to compel production of Lamb's file; (2) request state public defender hours for Wagner's private investigator; (3) write a letter allowing Wagner's private investigator to interview inmates in the St. Croix County Jail; (4) review a surveillance DVD of Rosenberg; and (5) obtain and review phone call recordings from the jail. Even accepting that Schutte failed to do these things, we cannot find that he was ineffective. Again, Wagner has failed to demonstrate how Schutte's conduct prejudiced him. Thus, like the trial court, we conclude Wagner did not receive ineffective assistance from Schutte.

¶27 Wagner also contends his third trial counsel, attorney Sonderhouse, was ineffective in a number of respects. For instance, Wagner alleges Sonderhouse performed deficiently by failing to listen to each of the recorded phone calls from the St. Croix County Jail. However, Sonderhouse testified he listened to all the phone calls Wagner provided to him. Sonderhouse's performance in this respect was not deficient.

¶28 Wagner also contends Sonderhouse was ineffective by failing to procure the attendance of "many witnesses" at trial, specifically inmates who would have testified that Rosenberg made up the sexual assault allegations.

Sonderhouse did procure the testimony of one inmate, Jess Camm, who testified that Rosenberg fabricated the allegations. At the postconviction hearing, Sonderhouse testified he did not call other inmates as witnesses because he felt the trial was going well and their testimony would only be cumulative. Sonderhouse was also concerned that these other inmates had "character flaws" and would be impeached by prior convictions. Sonderhouse's decision not to call these additional inmates as witnesses was a valid strategic choice and did not constitute deficient performance.

¶29 Wagner also argues Sonderhouse was ineffective by failing to: (1) obtain Lamb or Schutte's files; (2) review a surveillance DVD from the jail; (3) obtain Rosenberg's probation records; and (4) object to the trial court's violation of Wagner's right to self-representation. Wagner further contends Sonderhouse should have obtained an evidentiary ruling before advising him that his parole status and prior convictions could be admissible if he testified at trial. However, Wagner has not proven he was prejudiced by any of Sonderhouse's alleged deficiencies. Wagner has not demonstrated a reasonable probability that, but for Sonderhouse's alleged errors, the outcome of the trial would have been different. We agree with the trial court that Wagner did not receive ineffective assistance from Sonderhouse.

VI. Discretionary reversal

¶30 Wagner finally asks us to exercise our power of discretionary reversal pursuant to WIS. STAT. § 752.35, which permits us to reverse a judgment or order when the real controversy has not been fully tried or when it is probable that justice has for any reason miscarried. "We exercise our discretionary reversal power only sparingly." ***State v. Prineas***, 2009 WI App 28, ¶11, 316 Wis. 2d 414,

766 N.W.2d 206. Indeed, the case must be "exceptional." ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶31 Wagner argues that "[t]he same prejudice that resulted from the suppression of evidence and ineffectiveness [of counsel] resulted in the real issue of whether Wagner sexually assaulted Rosenberg [not being] fully tried." Wagner does not present any new argument or reasoning to support his claim that we should exercise our power of discretionary reversal. He does no more than allude to and rephrase the other arguments in his brief. This is a classic case of zero plus zero equals zero. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) ("We have found each of [the defendant's] arguments to be without substance. Adding them together adds nothing. Zero plus zero equals zero."). Wagner may not obtain a new trial in the interest of justice simply by rehashing arguments we have already rejected.

By the Court.—Judgment and order affirmed.

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