COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2777 **Cir. Ct. No. 98CF005276**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES B. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. James B. Williams, *pro se*, appeals from an order denying his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06 (2001-02).[1] Williams contends that: (1) he was denied due process as a result of

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

prosecutorial misconduct; (2) he was convicted in violation of the double jeopardy clause; (3) the postconviction court failed to adequately address the issue of judicial bias; (4) both trial and appellate counsel were ineffective; and (5) his sentence was unduly harsh. He contends that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel, prosecutorial misconduct, judicial bias, and the violation of his protection against double jeopardy. In so doing, he also contends that his trial counsel had a conflict of interest in that he failed to investigate and take pictures, failed to effectively cross-examine the victim, and believed Williams was guilty from the start. Because there was no prosecutorial misconduct, his constitutional protection against double jeopardy was not violated, the judicial bias contention is moot, and trial counsel was not ineffective, Williams' appellate counsel was not ineffective for failing to raise these claims. Williams' contention regarding his sentence was not raised below and is thus waived. Accordingly, we affirm.

I. BACKGROUND.

¶2 In October 1998, Williams was charged with child enticement and first-degree sexual assault of a child "for luring and fondling his eleven-year-old neighbor in a common stairway of their building." After a jury trial, Williams was convicted of child enticement and first-degree sexual assault of a child, in violation of WIS. STAT. §§ 948.07(1) and 948.02(1) (1997-98), and was subsequently sentenced on January 6, 1999. On May 6, 1999, his postconviction counsel filed a motion for resentencing. The motion was granted, and, after the matter was transferred to the Honorable Jeffrey A. Wagner, Williams was sentenced to two consecutive terms of imprisonment consisting of ten years for the first count and twenty-seven years for the second count. On direct appeal, this court affirmed on March 13, 2001. Williams filed a postconviction motion for a

new trial, pursuant to WIS. STAT. § 974.06, that was subsequently denied. He now appeals from the order denying his postconviction motion.[2]

II. ANALYSIS.

A. Williams was not denied due process, as there was no prosecutorial misconduct.

¶3 Williams argues that he was denied due process when the prosecutor: (1) "kept telling the jury that the alleged victim didn't lie"; (2) "kept appealing to the jury['s] common sense"; and (3) "repeatedly vouched for the allege[d] victim, and she knew this was wrong." Williams further argues that the prosecutor "made some improper comments about the defense witnesses."

¶4 "The determination of whether prosecutorial misconduct occurred and whether such conduct requires a new trial is within the trial court's discretion." ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). An appellate court will sustain a discretionary act if "the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982). However, "[i]f the misconduct 'poisons the entire atmosphere of the trial,' it violates due process." ***Lettice***, 205 Wis. 2d at 352 (quoting ***United States v. Pirovolos***, 844 F.2d 415, 425 (7th Cir. 1988)). Reversal on this basis is drastic,

[2] The Honorable Elsa C. Lamelas presided over the trial. After the motion for resentencing was granted, the matter was transferred to the Honorable Jeffrey A. Wagner for sentencing. The postconviction motion was heard by the Honorable Richard J. Sankovitz, as Judge Wagner was no longer assigned to the felony division when the motion was filed.

and "'should be approached with caution.'" ***Id.*** (quoting ***State v. Ruiz***, 118 Wis. 2d 177, 202, 347 N.W.2d 352 (1984)).

¶5 Thus, "[t]he test to be applied when a prosecutor is charged with misconduct for remarks made in argument to the jury is whether those remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (quoting ***Darden v. Wainwright***, 477 U.S. 168, 181 (1986)). Trial counsel is also "allowed 'considerable latitude,' with discretion … given to the trial court in determining the propriety of the argument." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citation omitted). The prosecutor is allowed to comment on and detail the evidence. ***Id.*** The prosecutor is also allowed to argue a conclusion from the evidence. *See* ***id.*** Accordingly,

> [t]he line between permissible and impermissible argument 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.

Id. at 454.

¶6 Here, the postconviction court determined that "[c]ommenting on whether a witness has reason to give false testimony is perfectly appropriate." It considered the argument of the prosecutor, and indicated that the prosecutor drew from the evidence and common sense. The postconviction court noted that the jury was instructed to consider the evidence when reaching its verdict, and not the conclusions or opinions of counsel. And finally, after articulating the standard of whether the remarks "so infected the trial with unfairness," the postconviction court determined that the prosecutor did not exceed the scope of evidence and that none of the arguments impacted Williams' due process rights. We agree.

¶7 Williams' contention that the prosecutor improperly: (1) told the jury that the victim did not lie; (2) appealed to the collective common sense of the jury; and (3) "vouched" for the victim even though she "knew this was wrong," does not hold. As noted by the postconviction court, the prosecutor acknowledged that there were some inconsistencies in the victim's testimony regarding the time period before and after the assault, but argued that the witness was consistent regarding the actual assault. She also argued that the victim had "no reason to lie." There does not appear to have been any evidence presented indicating that the victim had any reason to make up the story. The prosecutor was commenting on the evidence, and as noted above, that is not improper.

¶8 Further, regarding the appeal to common sense, "[j]urors are expected to bring commonly known facts and their experiences to bear in arriving at their verdict." ***State v. Poh***, 116 Wis. 2d 510, 518, 343 N.W.2d 108 (1984). "[W]e expect jurors to bring their experiences, philosophies, and common sense to bear in their deliberations." ***State v. Messelt***, 185 Wis. 2d 254, 264, 518 N.W.2d 232 (1994). Thus, so long as the prosecutor's comments do not cross the "line" noted above, appeals to the collective common sense of the jury are proper. Accordingly, as there was no prosecutorial misconduct, Williams was not denied due process.

B. Williams' constitutional protection against double jeopardy was not violated.

¶9 Williams was convicted of child enticement and first-degree sexual assault of a child, in violation of WIS. STAT. §§ 948.07(1) and 948.02(1). He contends that he was convicted in violation of the double jeopardy clause of the United States and Wisconsin Constitutions. *See* U.S. CONST. amend. V; WI

CONST. art. 1, § 8. He contends that his convictions are "not only the same in facts, same in time, but significantly the same in nature."

¶10 "Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that this court reviews de novo." ***State v. Davison***, 2003 WI 89, ¶15, __ Wis. 2d __ , 666 N.W.2d 1. "Whether a multiplicity violation exists in a given case, which requires a determination of legislative intent, is a question of law subject to independent appellate review." ***Id.*** The Wisconsin Supreme Court views the relevant provisions of the United States and Wisconsin Constitutions as "identical in scope and purpose[,]" and thus accepts the decisions of the United States Supreme Court as controlling. ***Id.***, ¶18. Accordingly, the Wisconsin Supreme Court

> read[s] the [United States] Supreme Court as saying that when a defendant is convicted under more than one statute for a single act or transaction and the charges constitute "the same offense" because they are identical in law and fact, the Double Jeopardy Clause prohibits cumulative punishments from these convictions *unless the relevant legislative body intended to authorize cumulative punishments*.

Id., ¶30. The "same offense" is defined as identical in law and fact. ***Id.***, ¶33. Thus, "[a]s a general proposition, different elements of law distinguish one offense from another when different statutes are charged. Different facts distinguish one count from another when the counts are charged under the same statute." ***Id.***, ¶41.

¶11 There is a two-step analysis for reviewing multiplicity claims. First, it is necessary to determine whether the offenses are identical in law and fact under the test set forth in ***Blockburger v. United States***, 284 U.S. 299 (1932). ***Davison***, 2003 WI 89, ¶43. In ***Blockburger***, the Supreme Court stated:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

Blockburger, 284 U.S. at 304. If, under the ***Blockburger*** test, the offenses are identical in fact and law, there is a presumption that the legislature did not intend for the same offense to be punished under two different statutes. ***Davison***, 2003 WI 89, ¶43. If, however, the offenses are *not* identical in fact and law, there is a presumption that the legislature *did* intend to allow cumulative punishments. ***Id.***, ¶44. Yet, the presumption is rebuttable. ***Id.*** Thus, the second step, "even if the charged offenses are *not* identical in law and fact, [requires the determination of] whether the legislature intended multiple offenses to be brought as a single count." ***Id.***, ¶45. However, the defendant has the burden of showing "a clear legislative intent" that the "cumulative punishments" are not intended or authorized. ***Id.*** The first step determines whether there is a potential violation of the double jeopardy protection, while the second step determines whether the defendant has a due process claim. ***Id.***, ¶46.

¶12 Williams was convicted of child enticement, under WIS. STAT. § 948.07(1), and first-degree sexual assault of a child, under WIS. STAT. § 948.02(1). Section 948.07 states, in relevant part:

> **Child enticement.** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> **(1)** Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

Thus, the elements of this crime include causing, or attempting to cause, a child to go into any vehicle, building, room, or secluded place, with the intent to have

sexual contact or intercourse with the child. Section 948.02 states, in relevant part:

> **948.02 Sexual assault of a child. (1)** FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

Accordingly, to find a defendant guilty of child enticement under § 948.07(1), the jury must find that the defendant caused or attempted to cause a child to go into a secluded place with the intent to have sexual contact or intercourse with the child. Actual sexual contact is not a required element. First-degree sexual assault of a child, on the other hand, requires only that the defendant had sexual contact or intercourse with a child under the age of thirteen. Clearly, these offenses are not identical in law. As in ***Blockburger***, "[e]ach of the offenses created requires proof of a different element." ***Id.***, 284 U.S. at 304.

¶13 While the offenses are clearly not identical in law, it is still necessary to determine whether the legislature intended to allow cumulative punishment. In ***Davison***, 2003 WI 89, ¶50 (footnote added), the supreme court delineated the four well known factors to consider in this analysis: "(1) all applicable statutory language; (2) the legislative history and context of the statute;[3] (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct." However, as noted above, the defendant has the burden of showing a clear legislative intent that the cumulative punishments were not authorized. Williams has not satisfied this burden.

[3] Neither party addresses the legislative history of the two relevant statutes. However, after reviewing the Draft Record for 1987 Wis. Act 332, there is no indication that the legislature intended to prohibit cumulative punishment under the two statutes.

¶14 WISCONSIN STAT. § 939.65 states, in relevant part: "[I]f an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." Accordingly, "[t]his section gives a green light to multiple *charges*, which may result in multiple *convictions*, under different statutory provisions." ***Davison***, 2003 WI 89, ¶51. Here, the only "shared" element of the two crimes is that the victim is a child, although that element is not identical in both crimes. The difference between the elements of the two offenses indicates that the legislature intended to allow cumulative punishments.

¶15 In addition, the plain language of WIS. STAT. § 948.07 recognizes the separate and distinct natures of the two offenses:

> **Child enticement.** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> **(1)** Having sexual contact or sexual intercourse with the child *in violation of s. 948.02 or 948.095*.

(Emphasis added.) The statute clearly indicates that violations of WIS. STAT. §§ 948.02(1) and 948.07(2) are separate offenses, with different levels of punishment.[4]

¶16 "Where the statutes intend to protect multiple and varied interests of the victim and the public, multiple punishments are appropriate. Moreover, multiple punishments are appropriate where the grounds for punishment are

[4] Under the 1997-98 Wisconsin Statutes, violations of WIS. STAT. §§ 948.02(1) and 948.07(1) are Class B and BC felonies, respectively.

different." ***State v. Wolske***, 143 Wis. 2d 175, 184-85, 420 N.W.2d 60 (Ct. App. 1988) (citation omitted). This court has articulated that the aim of WIS. STAT. § 948.07 is "to address the social evil of removing children from the protection of the general public." ***State v. Koenck***, 2001 WI App 93, ¶9, 242 Wis. 2d 693, 626 N.W.2d 359. Further, "[t]he gravamen of the crime is not the commission of an enumerated act, but succeeding in getting a child to enter a place with intent to commit such a crime." ***State v. Hanson***, 182 Wis. 2d 481, 487, 513 N.W.2d 700 (Ct. App. 1994). Accordingly, "the central concern of the statute is the removal of a child from the general public to a *secluded place* in order to facilitate various illegal conduct." ***State v. DeRango***, 229 Wis. 2d 1, 14, 599 N.W.2d 27 (Ct. App. 1999). On the other hand, the central concern of WIS. STAT. § 948.02(1) is the sexual contact or intercourse itself. The proscribed conduct of each offense is different. Separate punishment is appropriate under each statute, as they seek to punish distinct offenses and protect different interests.

¶17 Thus, a common sense reading of the statutes indicates that the legislature intended to allow cumulative punishments for the two different offenses. *See* ***State v. Grayson***, 172 Wis. 2d 156, 162, 493 N.W.2d 23 (1992) (stating "th[e] court must determine [the legislature's] intent … according to 'a common sense reading of the statute' that will give effect to 'the object of the legislature' and produce a result that is 'reasonable and fair to offenders and society.'") (citation omitted).

C. The judicial bias contention is moot.

¶18 Williams contends that the postconviction court "never address [sic] the issue of Judicial Bias, in His post-conviction motion."[5] The record belies this claim:

> During the sentencing hearing, the court mistakenly commented on the defendant's credibility at trial. This matter was raised in the motion filed by postconviction counsel, which resulted in a resentencing by a different judge. Consequently, any ineffectiveness o[n] the part of trial counsel in this respect was remedied by the resentencing proceedings.

The postconviction court determined that any judicial bias contention had already been remedied. We agree.

¶19 At a motion hearing, following Williams' conviction and sentencing, Judge Lamelas stated:

> Frankly, I would feel a little uncomfortable handling the resentencing of this case given what has already transpired. I think it's important that there be the appearance of fairness. I am concerned that I would simply, frankly, bearing in mind what happened here reimpose the same sentence. I don't think that is necessarily what would advance the appearance of justice.
>
> I was trying to reach Judge Wagner this morning since he's the chief judge of the felony division to transfer the case to him for resentencing. … [T]hat is the way I propose going about this.

[5] Williams also contends that the transcripts from June 29, 1999, are defective "because a lot of the statement [sic] made by Judge Elas [sic] Lamelas, is [sic] not on the record[,]" and "mov[es] this court" to correct the transcript. However, he provides no references to the record or examples of the statements to which he is referring. Accordingly, "[w]e will not consider arguments that are not supported by appropriate references to the record." ***State v. Lass***, 194 Wis. 2d 591, 604, 535 N.W.2d 904 (Ct. App. 1995).

To that, Williams' counsel replied: "Judge, I think that's appropriate under the circumstances." Thus, any potential judicial bias was remedied. Moreover, Williams fails to consider that his counsel stipulated to the transfer for resentencing. Williams also erroneously cites WIS. STAT. § 751.03(3)[6] and contends that "[a] Judge is not allowed … to give a case to a Judge of His or Her choice." As is evident from the transcript, Williams' characterization is an inaccurate account of the proceeding. Accordingly, Williams' contention that his conviction should be overturned is unsound.

D. Neither trial nor appellate counsel was ineffective.

¶20 Williams submits that his appellate counsel was ineffective because he failed to raise all of the issues Williams wanted to raise. In particular, he contends that his appellate counsel was ineffective for failing to raise claims of: (1) ineffective assistance of trial counsel; (2) prosecutorial misconduct; (3) judicial bias; and (4) double jeopardy violation. He contends that his trial counsel was ineffective because: (1) he should have informed the court that Williams never testified after Judge Lamelas made a reference to the defendant's testimony, and (2) he "was operating under a conflict of interest and didn't care[,]" in that he failed to take pictures of the crime scene, failed to effectively cross-examine the victim, and believed Williams was guilty from the start "because he relied on the police reports."

[6] WISCONSIN STAT. § 751.03(3) states: "The chief judge of any judicial administrative district may assign any circuit judge within the district to serve in any circuit court within the district."

¶21 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced as a result of this deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors were so serious that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—the ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume[]" counsel has rendered adequate assistance. ***Id.*** at 690.

¶22 As we have already concluded that Williams' prosecutorial misconduct, judicial bias, and double jeopardy contentions are unsound, accordingly, his contention that counsel was ineffective for failing to raise these issues fails. His contention that trial counsel was ineffective is unpersuasive for the reasons that follow.

¶23 Williams argues that his trial counsel should have informed the court that Williams never testified after Judge Lamelas made a reference to the defendant's testimony, and that he was ineffective for failing to do so. He cites this as "evidence" of his counsel's conflict of interest. Yet, even if this were to be deemed deficient performance, Williams fails to establish prejudice, as we have already concluded that any effect the court's statement may have had was remedied upon resentencing.

¶24 To support his contention that trial counsel was "operating under a conflict of interest[,]" Williams also argues that trial counsel failed to take pictures of the crime scene and failed to adequately cross-examine the victim. He identifies several statements made by the victim that he considered to be lies. He also contends that had trial counsel taken pictures of the crime scene, he could have "shown" the jury that the victim lied. Trial counsel questioned the victim about the time surrounding the assault, and the record indicates that there was inconsistent testimony presented. Yet, it is "[t]he function of the jury is to decide which evidence is credible and which is not, and how conflicts in the evidence are to be resolved." ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988). The jury presumably opted to believe the victim's account of the assault in this case. Trial counsel's cross-examination was appropriate, especially considering the fact that Williams was presenting an alibi defense.

¶25 In regard to his contention that trial counsel thought he was "guilty from the start," Williams argues that trial counsel relied on the police reports and emphasizes statements made by trial counsel at sentencing. Yet, trial counsel pursued and presented Williams' alibi defense. He proffered testimony from witnesses to corroborate Williams' alibi. In the end, however, the jury did not believe that defense. Trial counsel cannot be faulted for that eventuality.

¶26 Williams cites the following statement by trial counsel at sentencing in support of his conflict of interest claim: "He has not helped himself by his actions." However, that statement must be viewed in context. Trial counsel also stated that Williams maintains his innocence, noted that the jury deliberated for "quite awhile," seemingly indicating that the jury struggled with its decision, and commented on Williams' positive qualities. This does not seem to indicate that trial counsel's "own statement shown [sic] that … He believe [sic] that the

defendant was guilty[,]" or that counsel failed to effectively assist Williams in presenting his case to the court. There does not appear to be anything in the record to support Williams' contention that trial counsel was "operating under a conflict of interest." Accordingly, Williams failed to establish a conflict of interest and fails to show how he was prejudiced.

¶27 Based upon the foregoing, the trial court is affirmed.

By the Court.—Order affirmed.

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