COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP180 **Cir. Ct. No. 2006CF498**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES A. BOUC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 NEUBAUER, P.J. Charles Bouc was convicted upon his no contest plea to second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2)

(2007-08).[1] Bouc now appeals the circuit court's denial of his postconviction motion to withdraw his plea. Bouc contends that he is entitled to plea withdrawal based on ineffective assistance of counsel and newly discovered evidence. The circuit court denied Bouc's motion. We affirm.

BACKGROUND

¶2 On December 1, 2006, Bouc was charged with three counts of second-degree sexual assault of a child for events occurring between September 10, 1990, and September 9, 1992, and one count of child enticement for an incident occurring in 1996. The facts underlying the charges were set forth in the criminal complaint. In 2003, the complainant met with police and informed them that she began taking piano lessons from Bouc in his Manitowoc County, Wisconsin, home in the summer of 1989 when she was ten years old. The complainant alleged that beginning in the fall of 1991, when she was twelve years old, Bouc began to be "physically aggressive" with her, holding her hand, hugging her and intentionally touching her breasts. The contact continued and the complainant alleged that in 1996, Bouc became "bolder" and coerced her into having sexual contact on his sailboat. The complainant alleged that on another occasion at Bouc's home, Bouc had her remove her clothing and urinate into a cup; Bouc then drank the complainant's urine in an attempt to "recreate a ritual performed by Mahatma Gandhi." When interviewed by the police, Bouc denied that any sexual or physical contact ever occurred between the complainant and himself until after she turned eighteen. However, Bouc admitted that after the

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

complainant turned eighteen, they were naked together on his sailboat, as he was "trying to teach her 'the difference between sex and love.'"

¶3 On July 25, 2007, Bouc entered a plea agreement with the State. Bouc pled no contest to one count of second-degree sexual assault of a child with one count of second-degree sexual assault of a child dismissed but read in at sentencing, and the remaining two counts dismissed. Bouc's sentence was withheld and he was placed on five years of probation with conditions.

¶4 On July 7, 2009, Bouc filed a motion to withdraw his plea, alleging a manifest injustice based on ineffective assistance of counsel and newly discovered evidence. As grounds for withdrawal, the motion states in part:

> The Defendant's decision not to take his case to trial was difficult and based primarily on the advice of his trial attorney that none of the victim's diary would likely be admissible during trial.
>
> ….
>
> The Defendant has sworn that, had he known that facts about the diary might be admissible, he would not have entered the plea on July 25, 2007.
>
> Furthermore, it was not until after the Defendant's sentencing that [Bouc] discovered the victim's April 14, 2003 letter in which she details her first "sexual experiences" and makes reference to a date, October of 1996, which would have been after her eighteenth birthday on September 10, 1994.
>
> ….
>
> The evidence in this case was discovered after the Defendant's conviction.

Bouc requested and received a ***Machner***[2] hearing at which his trial counsel Ronald Kaminski, testified as to both pre-plea discussions regarding the use of the victim's diaries[3] at the hearing as well as his lack of knowledge regarding the April 15, 2003 letter from the complainant to Bouc.

¶5 At the ***Machner*** hearing, Kaminski testified that he has practiced law for forty years and had a "lengthy relationship" with Bouc. Kaminski testified that he represented Bouc in his criminal case, and that he and Bouc had discussed each of the allegations in the criminal complaint. Kaminski testified that there were diaries and "many, many letters back and forth between Mr. Bouc and [the complainant]" and Kaminski had examined "every single document that was given." Kaminski obtained the complainant's diary materials from the district attorney's office during the course of discovery and also obtained certain other documents directly from Bouc. Kaminski testified that while going through the letters, he made notes as to whether the contents were "good, bad, neutral," and then discussed those notes and concerns with Bouc. According to Kaminski, he

[2] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] While not a part of the appellate record, it is undisputed that the complainant kept a large number of documents, including diary entries and letters, during her studies under Bouc. Kaminski provided the following description:

> It appears that [the complainant] wrote notes to herself about important things in her life. And I suspect [Bouc] did too, he had copies and responded back. But the diary was not in the form of a diary that you or I might think about it in terms of there being a book where you continually go. It was all kinds of loose stuff least when I got it …. [I]t wasn't a typical diary, it was copies of notes and letters and so on between the two of them.

Both parties refer to the collection of documents as a diary or diaries; we will do the same.

and Bouc discussed the materials "in great detail over many, many, many hours." When questioned regarding the admissibility of the complainant's diaries, Kaminski responded:

> The admissibility of the diaries was not the issue. The issue was the impact of the rape shield law. Mr. Bouc seemed to be obsessed about the fact that this woman at age 18 turned into, I believe, he said at age 18 had become extremely promiscuous, and if I were to look at the things that she wrote him about her sexual experiences I would find out just how bad she had become in a very short period of time.
>
> And [Bouc] couldn't get over the fact that those could not be used—in my judgment—against her, against the prosecution. I said that it simply would be inadmissible. However, we did discuss in great length, also I believe with his wife present as well, the impact of the diaries. And the diaries contained very personal letters, a good many of which are very complimentary to Mr. Bouc about his teaching, the gratefulness of this young lady for his teaching and so on, reminisces about experiences that they had together while she was a student and of course it also contains letters from Mr. Bouc to her.
>
> But I also made it very clear to him that the information contained in those letters not withstanding the fact that many of them had been written after she had turned 18, that the obvious argument from the prosecution side is going to be that [Bouc] had spent a good number of years grooming this young lady.

Kaminski additionally cautioned Bouc that there were experts who might use the diary contents to demonstrate that the complainant exhibited classic signs of someone who has been sexually abused. Kaminski testified that he had to anticipate and did anticipate that if the matter went to trial and the diaries and documents came in for any purpose, then it was all going to come in, and Bouc needed to understand that. Kaminski recalled that when going through the diaries, he discovered the following reference made by the complainant: [Y]ou remember what you said to me—do unto others as you would have them do unto you.

Charles, do you want me to tell my mother about how you were molesting me all these years, would you like me to do unto you as you did to others." Kaminski testified that the reference "caught [his] attention" and was "troubling." The diary was not introduced as evidence at the motion hearing, and Bouc does not include the diaries in the appellate record.

¶6 Kaminski further testified that he had arguments with Bouc regarding whether the complainant's alleged promiscuity following her eighteenth birthday would be admissible for the purpose of demonstrating that Bouc did not do what the complainant accused him of doing. Kaminski testified that on at least three separate occasions, Bouc visited his office and spent an hour on each occasion talking about how he was going to the make the reversal of the rape shield law his "goal" in life.

¶7 When asked whether, at the time of his plea, Bouc understood the potential uses of the diaries and the pros and cons, Kaminski responded: "[W]e talked about it repeatedly. [A] typical appointment with Mr. Bouc would last an hour to an hour and a half. And during these sessions we would continually go over, go over, go over, and he was just obsessed with the idea of demonstrating that she had become a slut." Kaminski testified that it was Bouc's decision to enter a plea and that Bouc did so for financial and personal reasons and only after consulting with his family.

¶8 Kaminski additionally testified regarding Bouc's postconviction discovery of the April 15, 2003 letter written by the complainant to Bouc. In the letter, the complainant refers to her "first sexual encounters" and also at one point refers to the date of October 1996, which would have been after her eighteenth birthday. Kaminski testified that when the issue of the letter arose, he went

through (and had his secretary go through) every single piece of paper in Bouc's file. Kaminski noted that the April 15 letter, "sent and addressed to Mr. Bouc," was not in Bouc's file; however, a letter from Bouc to the complainant dated four or five days later and "obviously" written in response to the April 15 letter was in Bouc's file.

¶9 Further, Kaminski testified that while Bouc was very specific that he did not touch the complainant until she was eighteen, Kaminski considered the events of October 1996 to be potentially damaging if the details were to come before a jury. In light of the history Bouc provided Kaminski regarding those events, Kaminski believed the October 1996 incident to be the "Gandhi incident" that was referenced by the complainant in the criminal complaint. Kaminski testified to telling Bouc: "[I]f a jury hears that you created this thing upstairs in your bedroom, set up an altar, had a chalice, had [the complainant] disrobe, you disrobed, and you asked her to urinate into a cup or something, and you drank her urine, if that got before a jury … that would be very, very, very damaging."

¶10 Bouc also testified at the ***Machner*** hearing. Bouc testified that the diary contained "nothing but good references about [him]" and that Kaminski had acknowledged that the diary contained references that supported Bouc's innocence. However, based on his conversations with Kaminski, Bouc understood that none of the diary contents would be admissible because of the rape shield law. Despite Kaminski's testimony that Bouc's file contained a letter written in response to the complainant's April 2003 letter, Bouc denied ever having received the complainant's letter or having seen the letter until 2007, after his conviction. Bouc also testified that Kaminski had told him he would in all probability lose his case at trial. Kaminski denied telling Bouc he would be convicted at trial, but acknowledged reviewing with Bouc the risks associated with going to trial.

¶11 Following briefing by the parties, the circuit court issued a well-reasoned and thorough written decision on December 16, 2009. As to the admission of the diary evidence, the court found that Kaminski presented a "rational and concise explanation of his advice to Bouc" and was "clearly more credible." The court found that "Bouc's obsession with the rape shield law and its effect was apparent during his testimony," and that "[t]here was nothing ineffective about Kaminski's representation of Bouc." As to the April 2003 letter, the court found that "it is a reasonable inference Bouc received the letter and misplaced it until after his case was concluded." Moreover, the court rejected the notion that the letter, even if newly discovered, would have added to the strength of Bouc's defense. The court found that the letter contained "ambiguous information … consistent with the 100's of documents about which Kaminski testified." The court quoted the contents of the letter at length and noted that it related the good side of the complainant's relationship with Bouc, but it also related a dark side. The court noted that the letter included references to "[Bouc's] obsession, [the complainant's] discomfort, hiding from her parents, holding hands when she was 13, sexual pressures, sexual harassment and molestation." Finally, the court found that in light of the details surrounding the October 1996 "Gandhi incident" referenced in the letter, it was "more damaging than helpful to Bouc."

¶12 In denying Bouc's motion, the circuit court determined:

> Bouc has not shown by clear and convincing evidence that his plea was not voluntarily and knowingly entered. Kaminski was not ineffective. The 'newly discovered' evidence is, at best, cumulative and was probably in Bouc's possession all along…. [Bouc] has not proven that the withdrawal is necessary to prevent a manifest injustice.

Bouc appeals.

DISCUSSION

¶13 Bouc contends that the circuit court erred in denying his postconviction motion to withdraw his plea based on manifest injustice. Bouc renews his contentions that Kaminski misinformed him about the admissibility of the contents of the diary at trial and that the April 2003 letter from the complainant constitutes "newly discovered evidence." We address each of Bouc's contentions in turn bearing in mind that Bouc raises this issue postsentencing and it is his burden to show by clear and convincing evidence that the withdrawal of his plea is necessary to correct a manifest injustice. *See* ***State v. Lee***, 88 Wis. 2d 239, 248, 276 N.W.2d 268 (1979). We defer the withdrawal of a plea under the manifest injustice standard to the circuit court's discretion, and we will affirm if the record shows that the circuit court correctly applied the legal standards to the facts and reached a reasoned conclusion. ***State v. Nawrocke***, 193 Wis. 2d 373, 381, 534 N.W.2d 624 (Ct. App. 1995).

Ineffective Assistance of Counsel

¶14 The manifest injustice test can be met by establishing the ineffective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). Under ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), to establish ineffective assistance, a defendant must satisfy a two-part test. The defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Id.*** A claim of ineffective assistance of counsel is a mixed question of law and fact. ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. Thus, while we uphold the circuit court's findings of fact unless clearly erroneous, "the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review de novo." ***Id.***

¶15 Here, Bouc contends that Kaminski's assistance was ineffective because Kaminski provided him with incorrect advice involving the admissibility of the victim's diary. Bouc asserts that he was prejudiced because he relied on this advice in entering his plea. According to Bouc, Kaminski had told him that the contents of the diary could not be used for any reason. Bouc's attorney on appeal, Adam Walsh, baldly contends that, "throughout the hundreds of pages there is not one mention of anything elicit [sic] between Bouc and [the complainant]." Notably, however, Walsh's statement is not able to be verified on appeal as he has not included the "diary" in the appellate record. Further, he fails to acknowledge Kaminski's testimony to the contrary.[4] Kaminski testified that when reviewing the documents comprising the diary, his attention was drawn to a reference by the complainant to the effect of, "Charles, do you want me to tell my mother about how you were molesting me all these years, would you like me to do unto you as you did to others."

¶16 Kaminski's testimony demonstrates his belief that the diaries did not paint an entirely positive picture of Charles. Kaminski testified that he made it clear to Bouc that the diary could be used to show inconsistencies in the complainant's accounts, but that the prosecution could also use parts that were unfavorable to Bouc's defense. Kaminski stated that he and Bouc repeatedly went over the pros and cons of using the diary. The record reflects that Kaminski was also concerned that the diaries and letters between Bouc and the complainant

[4] We note that this is just one of several misstatements or mischaracterizations of testimony made by Walsh in Bouc's appellate brief. Whether a less significant misstatement (referring to trial counsel by an incorrect name throughout appellate briefing) or a more significant mischaracterization (omitting Kaminski's observation of a damaging statement in the complainant's diary), we admonish Walsh for his carelessness.

could be used by an expert as evidence of grooming and as support of the complainant's allegation that she had been sexually assaulted by Bouc. Clearly, Bouc's testimony as to the discussions regarding the admissibility of the diary conflict with Kaminski's testimony. However, the circuit court found that Kaminski was "clearly more credible" and we will not disturb the circuit court's credibility determinations on appeal. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980) (weight of testimony and credibility of witnesses are matters to be determined by the trier of fact). Moreover, given Bouc's failure to provide the diary contents on appeal, we could not conclude otherwise.

¶17 Based on the circuit court's findings, we conclude that Bouc failed to demonstrate that Kaminski's representation was deficient. We look at the strategic decisions of counsel with a high level of deference, and the representation will not be deemed ineffective unless it "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. The circuit court found credible Kaminski's testimony that he weighed the pros and cons of the diary evidence with Bouc, discussed the situation with Bouc for hours, properly informed Bouc of the law, and eventually offered his professional advice while still allowing Bouc to make the final determination as to how to proceed. We conclude, as did the circuit court, that Kaminski's representation of Bouc was not deficient.

Newly Discovered Evidence

¶18 Bouc's second basis for plea withdrawal rests on a claim of newly discovered evidence, namely the April 15, 2003 letter sent by the complainant to Bouc. Bouc contends that he did not discover the letter until 2007, and would not have pled guilty had he been aware of the evidence. Indeed, "[n]ewly discovered

evidence may be sufficient to establish that a manifest injustice has occurred." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). To withdraw a plea based on newly discovered evidence the defendant must prove by clear and convincing evidence that: (1) the evidence was discovered after conviction, (2) the defendant was not negligent in seeking evidence, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative. ***Id.*** "If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***

¶19 The letter in question, sent from the complainant to Bouc, refers to a sexual encounter in October of 1996. Bouc contends that the letter was discovered after conviction because he testified to that fact at the motion hearing. However, the circuit court expressly rejected the notion that the letter, to which Bouc had written a reply, was somehow "newly discovered." The circuit court observed: "Bouc presented no explanation as to why he would not have seen the letter addressed to him in April of 2003. Kaminski testified that he did not have a copy of the letter in his files and did not recall previously seeing it. Under the circumstances, it is a reasonable inference Bouc received the letter and misplaced it until after his case was concluded." The court clearly found credible Kaminski's testimony that he was not in possession of the April 15, 2003 letter prior to Bouc's plea. Further, Bouc provided no explanation at the postconviction hearing as to the existence in his file of a letter he wrote to the complainant in response to the April 15, 2003 letter. The circuit court determined that Bouc has failed to prove by clear and convincing evidence that the letter was "discovered" after his conviction. *See* ***McCallum***, 208 Wis. 2d at 473. Based on our review of the record, we uphold the circuit court's determination.

¶20 While we could end the decision here, we nevertheless note that the circuit court further found that "[e]ven if [the letter] qualifies as newly discovered evidence, it adds nothing to the strength of Bouc's defense." The court noted that the letter contained ambiguous information and that while it speaks to the good in the relationship between Bouc and the complainant, it also "relates the dark side of their relationship." The court cited various passages that could have been damaging to the defense. We have reviewed the letter, and we agree with the circuit court's assessment. Moreover, contrary to Bouc's assertion, the letter is ambiguous as to when his first sexual encounter with the complainant occurred. Insofar as the letter refers to the October 1996 incident involving what was characterized as a "Gandhi ritual," the circuit court echoed Kaminski's concern that the exposure of this incident would have been much more damaging than helpful. In sum, it was not reasonably probable that the April 2003 letter would have contributed to a different result being reached at a trial. *See* ***McCallum***, 208 Wis. 2d at 473.

¶21 As a final matter, we observe that Walsh certified that the appendix to Bouc's brief complies with WIS. STAT. RULE 809.19(2)(a), specifically, that it contains relevant trial court record entries, the trial court's findings or opinion, and portions of the record essential to our understanding of the issues. It does not. Consequently, we direct Walsh to pay $150 to the clerk of this court within thirty days of the release of this opinion. *See* ***State v. Bons***, 2007 WI App 124, ¶¶21-25, 301 Wis. 2d 227, 731 N.W.2d 367 (a violation of RULE 809.19(2)(a) and (b) warrants a monetary sanction against counsel).

CONCLUSION

¶22 Bouc's challenges to the circuit court's denial of his postsentencing motion for plea withdrawal fail. Based on our review of the record, we uphold the circuit court's determination that Bouc failed to carry his burden of demonstrating a manifest injustice on either grounds of ineffective assistance of counsel or newly discovered evidence. We affirm the circuit court's order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.