COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2036-CR **Cir. Ct. No. 2006CF32**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES R. BLACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Crawford County: WILLIAM D. DYKE, Judge. *Affirmed*.

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Charles R. Black appeals from a judgment of conviction for two counts of second-degree sexual assault of a mentally ill victim,

contrary to WIS. STAT. § 940.225(2)(c) (2007-08),[1] and from the July 30, 2009 order denying postconviction relief.

¶2 Black requests a new trial as a result of ineffective assistance of counsel and, under WIS. STAT. § 752.35,[2] on the basis that the real controversy was not fully tried.

¶3 Black bases both requests on the following three alleged errors at trial, none of which were objected to by his trial counsel: (1) testimony by Dr. Beth Huebner, the State's expert, was improperly admitted as ***Jensen***[3] testimony at trial; (2) testimony of witnesses that "telegraphed to the jury" that the witnesses believed the victim's story to be true was admitted at trial; and (3) multiple witnesses provided testimony which repeated the victim's version of events. We conclude that trial counsel's performance was deficient in that he did not object to the admission of the purported ***Jensen*** testimony but that this deficiency was not prejudicial to Black. We therefore affirm.

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

[2] WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

[3] ***State v. Jensen,*** 147 Wis. 2d 240, 432 N.W.2d 913 (1988).

BACKGROUND

¶4 In March 2006, Sara Ragels was an approximately twenty-year-old[4] developmentally-disabled adult who was described as having the capabilities of an eight- to ten-year-old child. She lived with her mother and step-father in Prairie du Chien, where she attended school. At Grandma's Grill, her mother's place of employment, she became acquainted with Black, who also worked there.

¶5 Ragels testified that on March 5, 2006, Black took her to his mobile home, which was located approximately twenty miles from Prairie du Chien, ostensibly to clean. According to Ragels, instead of cleaning, Black played pornographic videos and had her remove her clothes. Ragels also testified that while they were at Black's home, Black masturbated himself to climax and then either stimulated her to climax or instructed her to do the same for herself. She further testified that Black gave her $20, even though they had done no cleaning, and told her not to tell anyone.

¶6 Ragels testified that on March 15, 2006, Black met her as she was leaving the library and had her get into his car. She testified that Black took her to an area near the Mississippi River where he had her pull down her pants and inserted his penis first into her vagina and later into her anus. Ragels testified that Black gave her $5 and told her not to tell anyone or she would get into more trouble than he would.

¶7 Jackie Friederich, Ragels' mother, testified that on the night of March 15, 2006, she heard Ragels crying in her room and questioned her until

[4] Ragels was born on March 25, 1986.

Ragels told her about the March 5th and March 15th incidents with Black. Friederich testified that she then reported both incidents to the police, who commenced an investigation several days later.

¶8 In the course of their investigation, the police obtained a search warrant for Black's trailer, where, on March 29, 2006, they confiscated a blanket, a coat, and a pair of women's underwear that didn't belong to Ragels. No pornographic materials were found.

¶9 The blanket, coat and women's underwear were examined by the state crime lab for physical evidence. Black's semen was found on the blanket, but no DNA was found linking the blanket to Ragels. A stain on the coat proved to be semen and mixed DNA from Black and another person; however, that other person was not Ragels. No identified DNA was found on the underwear, which did not belong to Ragels in any event.

¶10 Black was found guilty by a jury of two counts of second-degree sexual assault of a person suffering from mental illness. He was sentenced to a total sentence of thirty years on each count, to run concurrently with one another, with initial confinement of fifteen years and fifteen years of extended supervision on each count. Black appeals.

¶11 Additional facts will be provided in the analysis below, as appropriate.

DISCUSSION

¶12 Black contends that he is entitled to a new trial because his trial counsel provided ineffective assistance to an extent that prejudiced the outcome of the trial. Black argues that counsel's performance was deficient because counsel

failed to object to three significant types of testimony, the cumulative effect of which was to improperly enhance the credibility of Ragels' testimony, upon which he asserts the State's entire case rests. Black claims that the collective effect of this inadmissible testimony undermines confidence in the outcome to such an extent that a new trial is required.

¶13 To succeed on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient; and (2) that the deficient performance prejudiced his or her defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985).

¶14 To prove counsel's representation was deficient, a defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. However, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Pitsch***, 124 Wis. 2d at 637 (citation omitted).

¶15 To prove prejudice, "[t]he defendant 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." ***Strickland***, 466 U.S. at 694.

¶16 Both the deficient performance and the prejudice prongs of the ***Srickland*** test are reviewed by this court as mixed questions of law and fact. ***Pitsch***, 124 Wis. 2d 633-34. We will accept the circuit court's findings of fact unless they are clearly erroneous; however, the legal questions of whether

counsel's performance was deficient and whether it was prejudicial to the defendant are reviewed *de novo*. ***Id***. at 634.

¶17 We first consider all of the trial testimony that forms the basis of Black's appeal to determine whether trial counsel provided deficient representation by failing to object to that testimony.

1. Deficient Performance

¶18 Black contends that trial counsel's performance was deficient because he failed to object to three types of testimony at trial. Black claims first that the testimony of Dr. Huebner was objectionable because ***Jensen*** testimony was not required and her testimony was not proper ***Jensen*** testimony, but rather inadmissible vouching for Ragels' veracity. Second, Black contends the testimony of several witnesses was objectionable because it telegraphed to the jury their personal belief that Ragels was telling the truth. Finally, Black contends the hearsay testimony of multiple witnesses who repeated Ragels' story further bolstered Ragels' credibility in an inappropriate manner.

a. Dr. Huebner's Testimony

¶19 Dr. Huebner testified at trial on behalf of the State regarding Ragels' behavior. Black asserts that Dr. Huebner's testimony was improper, and should therefore have been objected to by his trial counsel, because: (1) there was no showing that the necessary preconditions for testimony under ***State v. Jensen,*** 147 Wis. 2d 240, 432 N.W.2d 913 (1988), were present; and (2) Dr. Huebner's testimony, rather than performing the explanatory function that ***Jensen*** authorizes, inappropriately vouched for the veracity of Ragels. We address each assertion in turn.

¶20 Under ***Jensen***, an expert may be permitted to offer opinion testimony that a victim's behavior is consistent with the behavior of a person who has been sexually assaulted. ***Id***. at 256. The supreme court explained in ***Jensen*** that "[b]ecause a complainant's behavior frequently may not conform to commonly held expectations of how a victim reacts to sexual assault, courts admit expert opinion testimony to help juries avoid making decisions based on misconceptions of victim behavior." ***Id***. at 252. However, a ***Jensen*** expert is only allowed to offer such opinion testimony "if the testimony helps the jury understand a complainant's reactive behavior." ***Id***. at 257. A "circuit court may allow an expert witness to give an opinion about the consistency of a complainant's behavior with the behavior of victims of the same type of crime *only if* the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." ***Id.*** at 257 (emphasis added).

¶21 Black first contends that Ragels, who testified prior to Dr. Huebner, did not exhibit any reactive behavior which would have required the opinion testimony by Dr. Huebner to assist the jury in understanding such behavior. Black asserts that Ragels immediately reported the assaults to her mother and that her mother described her as visibly upset as she relayed to her mother what happened.

¶22 The State presented Dr. Huebner's testimony during its case-in-chief. Prior to trial, Black made numerous motions which indicated a possible intent on Black's part to make Ragels' behavior an issue at trial. Black did not do so, however, during his cross-examination of the witnesses who preceded Dr.

Huebner at trial.[5] Thus, while the prosecution logically could have anticipated from the pretrial motions that Black would present evidence that would have called for ***Jensen*** opinion testimony, no such evidence was ever actually offered by Black. Black's trial counsel, who was familiar with his own trial strategy, should have noticed that the State was eliciting ***Jensen***-type evidence. However, at the ***Machner***[6] hearing, counsel testified that he had no strategic reason for not objecting to Dr. Huebner's testimony. Counsel also testified that it had not occurred to him that Dr. Huebner's testimony was objectionable. We conclude that, because expert testimony on Ragels' behavior was not warranted under ***Jensen***, trial counsel was deficient in failing to object to Dr. Huebner's testimony on this ground. *See* ***id***. at 256.

¶23 Black also contends that counsel's performance was deficient for failing to object to Dr. Huebner's testimony regarding "sexual indices"[7] that Black now claims amounted to telling the jury that Ragels was telling the truth when she claimed that she was assaulted. As ***Jensen*** makes clear, a witness "must not be

[5] Among the witnesses who preceded Dr. Huebner were Ragels herself, her mother, the sexual assault nurse examiner (SANE), Rochelle Neisius, Police Officer Stacy Polodna, who interviewed Ragels, Dr. Larry Goodlund, a psychiatrist who treated Ragels, and Detective Larry Cuff, who had been in charge of the investigation.

[6] ***State v. Machner,*** 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[7] Dr. Huebner testified that "different kinds of indices" need to be looked at in determining whether or not sexual abuse has occurred. Those indices include: (1) the consistency of the alleged victim's report; (2) "[t]he child's affect"; (3) the details provided by the alleged victim, for example where it happened or when it happened; (4) any possible motivation on the part of the alleged victim to harm the accused; and (5) the existence of fear of the accused on the part of the alleged victim. Dr. Huebner testified that in Ragels' case, Ragels was consistent with her story; the affect on Ragels did not "have a lot of play" in light of her cognitive delay; Ragels provided some "very compelling" details; Ragels did not appear to have any motivation to cause Black harm; and there was evidence that Ragels was afraid and that she suffered nightmares about Black and the sexual assaults.

allowed to convey to the jury his or her own beliefs as to the veracity of the complainant with respect to the assault." ***Id***.

¶24 While counsel did not object to the testimony regarding "sexual indices," he did object to testimony of Dr. Huebner immediately prior to her testimony about "sexual indices":

> Q. Doctor, in your professional opinion based on everything that you have said, the research that you have done, your degree, the years of experience, the review of the chart and your interview with Sara, do you have an opinion within a reasonable degree of certainty in your professional field as to whether Sara appreciated what had happened to her at that trailer home just outside of Eastman and under the bridge here at Prairie du Chien?
>
> A. I don't think Sara had a full appreciation of what had happened to her.
>
> Q. Other than physically?
>
> A. Correct.
>
> Q. She knew what physically had happened?
>
> A. She knew physically what had happened, right.
>
> Q. Does she have the ability now or either then or now or in the future to be able to appreciate the wrongfulness and severity of the consequences of that?
>
> A. She may have a better understanding of that at this point because she has been through so much therapy at this point. Again, because she operates at the level at which she does I don't think she would have the kind of appreciation that a 22-year-old woman would have.
>
> Q. And that opinion is based on her diagnoses as mentally retarded and all the accompanying factors that you have listed out here today?
>
> A. Yes.

> ….
>
> Q. Doctor, I'm going to say a term out there and see if you recognize it. Sexual indices.
>
> A. Yes.
>
> Q. What does that term mean?
>
> A. Well, when there is sexual assault of a person generally we only have two people who are present, the perpetrator and the victim, so you only have two accounts of what actually happened.

At this point, counsel objected, though not to the "sexual indices" testimony that was to follow, but rather to the preceding testimony. The grounds of his objection were very similar to what Black now asserts he should have used in objecting to the "sexual indices" testimony.[8] Black's trial counsel argued to the court:

> [Dr. Huebner] opined that at the time Ms. Ragels was not able to appreciate the significance of her conduct, and that's an ultimate fact issue. Dr. Huebner was the ***Jensen*** expert here. Under the consistent law they are not to make any conclusions about that. In her report her conclusion is one simple sentence. "On the basis of the interview and review of the collateral information it can be stated within a reasonable degree of psychological certainty that Sara's behaviors of reporting of the event are consistent with an individual who was assaulted," which is entirely permissible in her role as a ***Jensen*** expert, but the [S]tate has now had her state a conclusion about an ultimate fact issue for the jury to decide, and I think that needs to be—the jury needs to be instructed that they are to disregard that.

The court overruled the objection.

[8] Trial counsel has also specified an incorrect ground for his objection. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." WIS. STAT. § 907.04. A more appropriate objection would have been that which appellate counsel utilizes, that no witness may give an opinion that another competent witness is telling the truth. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

¶25 We conclude that failure to object to Dr. Huebner's testimony on the sexual indices was also deficient performance. This testimony contravened ***Jensen*** by telling the jury that, according to the sexual indices, Ragels was telling the truth.

¶26 In summary, given the emphasis in ***Jensen*** itself, both as to whether the expert testimony is called for at all and not allowing the expert to convey to the jury his or her own beliefs as to the veracity of the complainant, trial counsel was deficient in failing to object on both grounds.

b. Testimony of Detective Cuff and Nurse Practitioner Neisius

¶27 Black asserts that Detective Cuff and Nurse Practitioner Neisius "gave improper testimony that conveyed to the jury their belief that Ragels was being truthful." No objection on these grounds was made by trial counsel.

¶28 Detective Cuff testified at trial regarding his interview with Ragels and regarding Ragels' testimony at trial:

> Q. How would you compare the two—styles is not the right word, but the way that she carried herself on the stand two days ago two years after that incident and what you saw on March 20, 2006?
>
> A. I guess I would say that *she has come to accept the fact* a lot more readily than that day when we interviewed her that day. [sic] I would guess that she has kept this in her mind maybe or something that keeps bringing it up that that's how she is conducting herself now.
>
> Q. Did it seem that she talked about what happened to her more easily two days ago or two years ago?
>
> A. I think two days ago.
>
> Q. But two years ago when she was interviewed, Officer Polodna was here and testified, did it appear

that Officer Polodna had to drag information out of her?

A. I wouldn't say drag it out. He would ask a question and then *I don't think she knew, and I'm not even sure at this point in time if she really knows what the seriousness was of what happened to her* during those incidents I think because she still has the mentality I think of a nine- or ten-year-old child. (Emphasis added). [9]

¶29 The objected-to portions of Neisius' testimony include the following:

Q. How do you know [Ragels]?

A. She was my patient.

Q. In what capacity?

A. I saw her at the clinic for a bowel problem a few months before *I saw her for her sexual assault*. (Emphasis added.)

Black also objects to the following testimony from Neisius later in the proceeding:

Q. Did you reassure her?

A. Yes.

Q. What did you say to her to reassure her?

A. *Anytime you have a victim of assault* you always try to reassure them and let them know it's okay to tell their story and that they did not do anything wrong and that they didn't deserve to have that happen to them. (Emphasis added.)

¶30 Examined closely, the testimony of both Detective Cuff and Neisius certainly appears to vouch for Ragels' truthfulness and could have been subject to

[9] At this point, trial counsel offered an objection to Detective Cuff's testimony about Ragels' "competency or intelligence" on the grounds of lack of foundation. It was overruled.

an objection. However, in order to constitute deficient performance by counsel, counsel's failure to object must be more than just a failure to offer a possible objection. The acts of counsel must be "outside the wide range of professionally competent assistance." ***Pitsch***, 124 Wis. 2d at 637 (citation omitted). In reviewing such action, we are to "recognize that counsel is strongly presumed to have rendered adequate assistance." ***Id.*** (citation omitted).

¶31 At the ***Machner*** hearing, counsel testified that, in both cases, "at times objecting can draw more attention to something than not objecting, and by doing that, giving it more weight than it would seem if you wouldn't have objected." We cannot, therefore, conclude that counsel's performance was deficient as to these three brief fragments of testimony.

c. Alleged Hearsay Repetition of Ragels' Story by Other Witnesses

¶32 Black asserts:

> After Ragels testified, the following six witnesses repeated Ragels' story: her mother, nurse practitioner Neisius, Officer Polodna, Ragels' therapist Dr. Goodl[u]nd, Detective Cuff, and Dr. Huebner. Such testimony was clearly hearsay.... [I]f a statement does not fit one of the exceptions, it is inadmissible. WIS. STAT. § 908.02.

Black asserts that counsel's failure to object to all such testimony constituted deficient performance. The State argues in response that the testimony of each of these witnesses was either not hearsay or was admissible under an exception to the hearsay rule.

¶33 At the ***Machner*** hearing, trial counsel was asked only about whether he thought the testimony of Detective Cuff and Neisius was hearsay and why he did not object. Counsel was not questioned regarding the testimony of the other

witnesses Black now maintains was hearsay testimony that should have been objected to. As recounted above, counsel testified that he did not want to draw attention to the testimony of Detective Cuff and Neisius. It is a reasonable inference from counsel's testimony that counsel would have applied the same logic in deciding whether to object to the testimony of Jackie Friederich, Officer Polodna, Dr. Goodland, and Dr. Huebner, testimony which Black now asserts was inadmissible hearsay.

¶34 At least arguably, the testimony of Friederich could have been admitted as an excited utterance under WIS. STAT. § 908.03(2). The statements of both Neisius and Goodland could have arguably fallen within the medical history exception of WIS. STAT. § 908.03(4). Counting Ragels' own testimony, therefore, the jury would have heard the same story four times, even without successful objection to the testimony of Detective Cuff, Polodna and Dr. Huebner. However, given trial counsel's explanation and the possibility that several of the objections would have been overruled, we cannot say that this constituted deficient performance.

2. Prejudice

¶35 Having determined that trial counsel was deficient in failing to object to the ***Jensen*** testimony given by Dr. Huebner, we now consider whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Pitsch***, 124 Wis. 2d at 640-41 (citation omitted).

¶36 Black argues that the entire matter came down to Ragels' credibility and that testimony which improperly vouched for her credibility would be extremely prejudicial.

¶37 We are not persuaded. There was no physical evidence that linked Black to sexual contact with Ragels. Since the police investigation did not even commence for several days, and the examination by the SANE nurse took place eight days after the alleged assault, there were no pubic hair combings or DNA swabs. There was no apparent bruising. Overall, Neisius testified that most of the physical exam was "fairly negative."

¶38 Neisius did note a small tear in the anus, which she estimated at five millimeters in length. However, on cross-examination, she admitted that, given Ragels' chronic difficulty in having bowel movements, the tear could have been "related to stress from constipation." She also found that Ragels' hymen was present "all the way around the edges."[10] The items seized in the search of Black's home did not produce any of Ragels' DNA. There were no eyewitnesses to either incident.

¶39 Ragels' own testimony about the two incidents was detailed and specific. The testimony of other witnesses, who recounted her story as told to them by Ragels, was consistent with her testimony in this respect and provided confirmation that she had told a consistent story over time. Her accurate description of the site of the March 15, 2006 incident and her accurate description of Black's bedroom and bedspread lent further credence.

¶40 In its consideration of Ragels' testimony, the jury could also consider what motive Ragels might have had for inventing such a story. No

[10] While visible damage to Ragels' hymen might have provided evidence of penetration, Neisius testified that the presence of the hymen "all the way around the edges" was not unusual as the hymen naturally becomes more "irregular in shape" as a young woman ages.

serious suggestion of such a motive was ever offered. In addition, Black's alibi defense was weak, being largely dependent on the recollections of close family and the drawing of a complex timeline which only supported an alibi if every part of its web of testimony was completely accurate.

¶41 We conclude, upon our independent review of all of the evidence, that the jury had a sufficient basis for its verdict even without the purported ***Jensen*** testimony. Black has thus failed to show that the result of the trial would likely have been different but for counsel's deficient performance. ***Strickland***, 466 U.S. at 694.

¶42 Accordingly, we conclude that the second prong of the ***Strickland*** test is not met and that counsel's deficient performance was not "so serious as to deprive [Black] of a fair trial." ***Pitsch***, 124 Wis. 2d at 640-41. Because we have determined that Black was not deprived of a fair trial, we do not reach the issue of whether the real controversy was not fully tried. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.