COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP589
2010AP1137-W

Cir. Ct. No. 2005CF2329

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

NO. 2010AP589

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRELL LEMONT OTIS,

DEFENDANT-APPELLANT.

NO. 2010AP1137-W

STATE OF WISCONSIN EX REL. DARRELL L. OTIS,

PETITIONER,

V.

WILLIAM POLLARD, WARDEN,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

HABEAS CORPUS original proceeding. *Writ denied*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Darrell Lemont Otis appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief. He also filed a petition for writ of habeas corpus under ***State v. Knight***, 168 Wis. 2d 509, 512, 484 N.W.2d 540 (1992), asserting that his appellate counsel gave him constitutionally deficient representation. We consolidated the petition with this appeal. Otis claims: (1) the evidence was insufficient to support the time-period element of his repeated sexual assault conviction; (2) that his appellate counsel was constitutionally deficient for not adequately raising the insufficiency issue; and (3) his trial lawyer gave him constitutionally deficient representation by not using his work records to show he was at work during the time two of the assaults may have occurred. We affirm the order and deny the petition.

I.

¶2 In April of 2005, Otis's stepdaughter, Latifah G., born August 22, 1987, and Otis's niece, Laquanda R., born June 19, 1988, reported to police that Otis had sexually assaulted them several years earlier. Otis was charged with six counts of child sexual assault, including, as material to this appeal, repeated sexual assault of the same child, Laquanda, *see* WIS. STAT. § 948.025(1)(b), who, at the trial in October of 2005, testified that when she was "[e]ither 12 or 13" years old,

Otis repeatedly sexually assaulted her. She told the jury that Otis assaulted her "15 to 25" times, and specifically described what she said he had done to her:

- Otis "grabbed my hand and placed it in his pants" and "made me masturbate him."
- He "pressed up against me and … touched … [m]y breasts and my private," which meant her vagina.
- He "play[ed] with my breasts and plac[ed]" his private up against … [m]y breast."
- He told her "to get on my knees[,] … unzipped his pants and … made me perform oral sex on him" by "grabb[ing] my hair and my head" and [p]ush[ing] it up against his private, my face on his private."
- While in his car, Otis "unzipped his pants and he grabbed the back of my neck and pushed my face down on his private." When Laquanda tried to get up, "He pushed my face down by his private harder and I choked." But Otis "just began to move my head up and down on [his penis.]"
- One time at Laquanda's home, Otis followed her into her bedroom and Laquanda testified Otis: "made me get on my knees" and "made me perform oral sex on him."
- He "groped" her "breasts, my private, and my butt."

- One time he was "grinding" her, which she described as laying on top of her with "his private out" and pushing it on her "private" while she was clothed.

¶3 Although Laquanda had told police that she thought two of Otis's assaults occurred after school, one "about 4:00 p.m." and another "about 3:00 o'clock p.m.," she did not testify to any specific times during the trial.

¶4 The jury was instructed to find Otis guilty on the repeated-sexual assault charge if: "[a]t least three sexual assaults took place" between "June 1, 2001 and June 18, 2003." As noted, the jury convicted Otis. The trial court denied Otis's postconviction motion and we affirmed the convictions on his direct appeal. *See* ***State v. Otis***, No. 2006AP2194-CR, unpublished slip op. (WI App Sept. 20, 2007).

¶5 The Frank J. Remington Center filed Otis's WIS. STAT. § 974.06 motion for postconviction relief, which the trial court denied. We discuss Otis's contentions on this appeal in turn.

II.

A. *Insufficiency of the Evidence.*

¶6 Otis claims that the evidence does not support his conviction on the charge of repeated sexual assault of Laquanda. He argues that the time period alleged for this charge does not match exactly the time period that Laquanda testified to, asserting that Laquanda testified that the assaults occurred when she was twelve or thirteen years old, which would be June 19, 2000 to June 18, 2003, but the jury had to find that the requisite number of assaults happened between

June 1, 2001, and June 18, 2003. We disagree with his argument that the evidence does not support his conviction.

¶7 ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990), recounts the standard we must apply:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

(Citations omitted.)

¶8 In order to prove Otis guilty of repeated sexual assault of Laquanda, the State had to prove beyond a reasonable doubt that: (1) Otis committed three or more sexual assaults as defined in WIS. STAT. § 948.02(1) or (2); (2) within a specified period of time; (3) against Laquanda. *See* WIS. STAT. § 948.025(1)(b).[1] Otis challenges only the sufficiency of the specified-time element.

[1] WISCONSIN STAT. § 948.02 provides in pertinent part:

> **(1)** FIRST DEGREE SEXUAL ASSAULT. (am) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm to the person is guilty of a Class A felony.
>
> (b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.

(continued)

¶9 The Record shows sufficient evidence under our standard of review to support beyond a reasonable doubt that Otis repeatedly sexually assaulted Laquanda between June 1, 2001 and June 18, 2003. According to the Record, on June 1, 2001, Laquanda was twelve years old, and on June 18, 2003, she was thirteen years old, turning fourteen the next day. As we have seen, she testified that during the time she was twelve and thirteen, she was sexually assaulted "15 to 25 times," specifically describing eight separate incidents. The jury did not need to agree on which three assaults occurred, only that Otis was guilty of at least three during that time period. *See* ***State v. Johnson***, 2001 WI 52, ¶15, 243 Wis. 2d 365, 375, 627 N.W.2d 455, 459 ("[T]o convict under [WIS. STAT. § 948.025], the jury need only unanimously agree that the defendant committed at least three acts of

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> (c) Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.
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> (d) Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs.
>
> (e) Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.
>
> **(2)** SECOND DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

WISCONSIN STAT § 948.025(1)(b) provides:

> **(1)** Whoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child is guilty of:
>
> ….
>
> (b) A Class B felony if at least 3 of the violations were violations of s. 948.02(1)(am), (b), or (c).

sexual assault of the same child within the specified time period. Where evidence of more than three acts is admitted, the jury need not unanimously agree about the underlying acts as long as it unanimously agrees that the defendant committed at least three."). Moreover, the jury was specifically instructed to find that at least three of these assaults occurred between June 1, 2001 and June 18, 2003. The specified time period includes more than one year within which Laquanda said Otis assaulted her. That Laquanda was twelve years old for some of the time outside this specified time period does not make the evidence insufficient. The overlap between Laquanda's testimony and the specified time period was sufficient to allow a "possibility" that "the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find that" at least three of these assaults were within the specified time period. Accordingly, Otis's claim that the evidence was insufficient to support his conviction is without merit.[2]

B. ***Knight*** *Petition.*

¶10 Otis's petition for writ of habeas corpus asserts that his appellate lawyer gave him constitutionally deficient representation because the lawyer did not make the specific sufficiency-of-the-evidence claim that Otis makes in this appeal.

¶11 To establish constitutionally deficient representation, a defendant must show: (1) deficient representation; and (2) resulting prejudice. ***Strickland v.***

[2] We have concluded the evidence is sufficient to support the repeated sexual assault conviction; thus, we need not address Otis's request to reverse the other counts on the basis of retroactive misjoinder because this argument was conditioned upon winning on the sufficiency claim. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 663 (1938) (only dispositive issues need to be addressed).

Washington, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by his or her lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[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." ***Id.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted). We need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697.

¶12 As we have seen, Otis has not shown that the evidence was insufficient to support his conviction on the repeated-sexual-assault-of-a-child count. Thus, Otis was not prejudiced as that concept is used in ***Strickland*** because his appellate lawyer did not make that argument. *See* ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659, 662 (Ct. App. 1994) (A defendant is not prejudiced under the ***Strickland*** standard when the lawyer does not make an argument that would not have prevailed.).

C. *Ineffective Assistance of Trial Counsel.*

¶13 Otis claims his trial lawyer gave him constitutionally deficient representation because he did not use Otis's work records to show that Otis was working on two of the afternoons Laquanda told the police she thought Otis had assaulted her.

¶14 The trial court denied this claim, reasoning:

> The court observed the witness in this case, and the court perceived her as entirely credible and attempting to give an accurate account of events. Even though the presentation of the time sheets *might* have demonstrated that the defendant could not have been where Laquanda believed he was during this time, it doesn't mean that Laquanda was purposefully telling a falsehood. The victims in this case were asked to pinpoint dates and times going back several years. The month of August 2004 at around 3 pm is not cut in stone. She could not even remember it was August. The victim was interviewed almost a year after the occurrence, and there is not a reasonable probability that a jury would have held her to that specific date and time had this evidence been presented during the trial, given the amount of time that had elapsed since the assaults occurred, the number of assaults she was exposed to, and the way the jury perceived her on the witness stand. Therefore, it is not reasonably probable, even if trial counsel knew about the defendant's work schedule and presented it to the jury, that the jury would have been persuaded that the victim was somehow not telling the truth, *particularly* given the multiple instances of sexual assault to which she said she was subjected.

(Footnote omitted.)

¶15 On our *de novo* review of the trial court's legal analysis, and giving its implicit findings of fact the requisite deference, *see* WIS. STAT. RULE 805.17(2) (trial court's findings of fact accepted on appeal unless they are "clearly erroneous") (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)), we agree with the trial court's assessment. As we have seen, although Laquanda

initially told the police that she thought two of these assaults took place after school at 3:00 and 4:00 p.m. in August of 2004, she never gave a specific time during her trial testimony. When asked "Do you recall telling this officer seated next to me that it was in August of 2004?" she answered: "Probably. I don't remember. … I don't remember when it was." Thus, the work records could only have impeached Laquanda's initial statement to police, which in itself, was not certain as to time or date. Otis was not deprived of a fair trial and a reliable outcome, *see* ***Strickland***, 466 U.S. at 687, because the jury did not have Otis's work records. Accordingly, Otis's trial lawyer was not ineffective for not using them at trial.

By the Court.—Order affirmed; petition for a writ of habeas corpus denied.

Publication in the official reports is not recommended.