COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP691-CR **Cir. Ct. No. 2008CF215**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBY J. KLIMEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Bobby Klimek appeals a judgment convicting him of repeated sexual assault of a child, Brianne F. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of his trial counsel, Andrew Williams. Klimek argues that Williams was ineffective in two

respects: (1) he failed to call Cassandra Elbe as a witness to testify that Brianne had a reputation for untruthfulness; and (2) Williams failed to object to Brianne's testimony about earlier sexual relations between her and Klimek in another county. Klimek describes this testimony as "other acts evidence" and contends that it would not be admissible under ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). We reject these arguments and affirm the judgment and order.

¶2 To establish ineffective assistance of counsel, Klimek must show deficient performance and prejudice to the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1994). To prove deficient performance, he must establish that Williams' representation fell below an objective standard of reasonableness. ***State v. Johnson***, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). He must show his attorney's acts were outside the wide range of professionally competent assistance as illustrated by prevailing professional norms. ***Id.*** at 127. He must also overcome the presumption that his counsel's actions constituted sound trial strategy. ***Strickland***, 466 U.S. at 689. To establish prejudice, Klimek must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.***

FAILURE TO CALL CASSANDRA ELBE

¶3 Klimek established neither deficient performance nor prejudice from Williams' failure to call Elbe as a witness. Elbe worked as a waitress at a restaurant where Brianne was primarily a dishwasher and both Klimek and his wife worked. The record establishes no basis for Williams to have known of Brianne's alleged reputation for dishonesty. The trial court found Williams'

postconviction testimony credible that Klimek and his wife did not disclose this reputation. In fact, Klimek's wife testified that she trusted Brianne. Klimek and his wife knew Brianne much better than Elbe did. Elbe testified that they were not close and seldom talked. On the other hand, Brianne babysat for the Klimeks and they were substantially more familiar with her. Reasonably effective counsel would not have suspected that Elbe had greater understanding of Brianne's reputation for honesty than the Klimeks. In fact, Elbe had so little contact with Brianne, the trial court questioned whether there was sufficient foundation for her to testify as to Brianne's reputation.

¶4 Elbe also testified at the postconviction hearing about a telephone call she received from Brianne in which Brianne told her of the sexual assaults. Elbe was surprised at receiving the call because they "never talked" and "weren't close." Elbe testified that she "kind of" believed Brianne was bragging about the relationship. Williams reasonably concluded that Elbe's testimony about the phone call would be a prior consistent statement that would bolster Brianne's credibility. Not calling Elbe as a witness constituted a reasonable trial strategy.

¶5 Klimek did not establish prejudice from Williams' failure to call Elbe. Her testimony may have been inadmissible for lack of foundation. It was not persuasive because it contradicted the Klimeks' assessment of Brianne's trustworthiness and they were in a superior position to know. Finally, it could have led to introduction of a prior consistent statement.

FAILURE TO OBJECT TO OTHER CRIMES EVIDENCE

¶6 Williams' decision not to object to Brianne's testimony about incidents in another county constitutes a reasonable trial strategy. Williams testified that Brianne's testimony was inconsistent with earlier statements she

made regarding the incidents in the other county. As a strategic matter, he wanted to use the inconsistent statements to impeach Brianne's credibility. Williams testified that he considered objecting to the testimony but thought that it was favorable to Klimek to have Brianne's inconsistent statements brought to the jury's attention. Counsel's strategic choices made with full knowledge of the facts and law are virtually unchallengeable. ***Strickland***, 466 U.S. at 690-91.

¶7 Klimek also failed to establish prejudice from Williams' failure to object to the testimony regarding earlier assaults. Assuming these acts qualified as "other acts evidence" they were admitted for an acceptable purpose of explaining Klimek's and Brianne's pre-existing and seemingly odd relationship. Testimony about those acts provided background and context and were not introduced to show propensity. The probative value of this testimony was not substantially outweighed by the danger of unfair prejudice because it is unlikely the jury would doubt Brianne's testimony about the Brown County incidents but convict Klimek based on incidents in the other county. Applying the ***Sullivan*** test, the trial court properly indicated that an objection would have been overruled. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). Therefore, Klimek was not prejudiced by Williams' failure to object to that testimony. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).