COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0299-CR **Cir. Ct. No. 96CF000163**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY GEORGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Larry George appeals a judgment convicting him of falsely imprisoning and twice sexually assaulting James M.S. He also appeals an order denying postconviction motions alleging ineffective assistance of trial

counsel and denial of his right to speedy disposition of an intrastate detainer under WIS. STAT. § 971.11.[1] He argues that (1) the prison warden failed to comply with § 971.11(1) because he did not send a written request to the district attorney for prompt disposition of the case upon being informed of the charges and that the prosecutor impermissibly circumvented the statute by not filing a detainer; (2) the State violated the mandate of ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), when it failed to provide him with a City of Appleton police report describing other crimes George committed against the same victim; (3) the State introduced improper testimony vouching for James M.S.'s credibility; (4) the State violated the rape shield law, WIS. STAT. § 972.11(2)(b), when it asked James M.S. whether he was a heterosexual; and (5) he was denied effective assistance of trial counsel in numerous respects. We reject these arguments and affirm the judgment.

¶2 James M.S. alleged that George and an accomplice took him from his home in Appleton, forced him into a car and told him they were going to take care of money James owed George. They drove to Green Bay where George repeatedly sexually assaulted James. Shortly after the incident, George absconded from his parole and moved to Nevada. He turned himself in two years later and was returned to prison for the parole violation. George contends that he repeatedly requested speedy disposition of these charges, but the warden did not immediately notify the district attorney that George sought prompt disposition of the case. He also argues that the State failed to file a detainer for the purpose of circumventing his right to prompt disposition of the charges.

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

¶3 George was not denied his speedy disposition rights under WIS. STAT. § 971.11 because he did not give the proper notice to invoke that statute. Until George made a specific request to the warden, George had not strictly complied with the provisions of WIS. STAT. § 971.11(1) and the warden's duties under the statute were not invoked. *See* ***State v. Adams***, 207 Wis. 2d 568, 574-75, 558 N.W.2d 923 (Ct. App. 1996). George apparently expected the warden to extrapolate from several documents that charges were pending and that George sought prompt disposition. George sent messages to his social worker asking whether a detainer had been lodged and asking the social worker to call the prosecutor. He also challenged the prison's telephone rules which he believed interfered with his ability to seek disposition of these charges. Section 971.11(1) does not require the warden to extrapolate from these requests and complaints whether George was seeking prompt disposition of the charges. When George ultimately made a plain request that the warden write to the district attorney and demand prompt disposition of the case, the warden complied and the prosecution was commenced within the times set by § 971.11.

¶4 George cites no authority for the proposition that the prosecutor is required to issue a detainer. In ***State v. Davis***, 2001 WI 136, ¶27, 248 Wis. 2d 986, 637 N.W.2d 62, the supreme court held that dismissal without prejudice was an available remedy for failure to bring a case for trial within 120 days as required by WIS. STAT. § 971.11(2). This ruling implies that there is no requirement for a prosecutor to commence proceedings by filing a detainer. The only duties placed on the district attorney by § 971.11 are activated by the inmate's request, through the warden, for prompt resolution of a case. No statute compels the prosecutor to file charges or issue a detainer. George does not allege and the record does not

show that the prosecutor's delay in bringing the charges compromised his ability to present a defense.

¶5 Next, the State did not fail to disclose exculpatory evidence when it failed to disclose an Appleton police report containing information about George's prior threats and sexual assault of James M.S. A violation occurs if the State withholds evidence that is favorable to the accused and material to either guilt or punishment. ***Brady***, 373 U.S. at 87. The Appleton police report did not contain any exculpatory information. It did not contradict James M.S.'s testimony on any material point. It provided some additional detail of events that James M.S. alluded to during his testimony, establishing he was afraid of George because of previous intimidation involving weapons. Nothing in the police report contradicts that assertion.

¶6 The State did not violate the rule set out in ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1989), that prohibits any witness from stating an opinion whether another witness was telling the truth. The police officer who initially investigated the false imprisonment testified that James M.S. started to "clam up and became very reluctant to discuss the information with me." The officer concluded that James was evasive and referred the matter to the sensitive crimes unit. The officer stated that department policy required the officer to get the initial information "to determine … whether or not the individual is being forth right [sic] and then we contact the lieutenant who in turn reassigns the sexual assault investigation to a sensitive crimes investigator." The officer's statement does not indicate whether the referral is made because the officer believes the complainant is forthright or, as here, because he did not believe the complainant was being totally honest. The officer's testimony cannot be reasonably viewed as vouching for James M.S.'s credibility.

¶7 Next, the State did not violate the rape shield law when the prosecutor asked James M.S. if he was a heterosexual. WISCONSIN STAT. § 972.11(2)(b) prohibits any evidence of the complaining witness's prior sexual conduct and reputation. Sexual orientation is not conduct or reputation.

¶8 Finally, to establish ineffective assistance, George must show deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. ***Id.*** at 690. To establish prejudice, George must show more than some conceivable effect on the outcome. Rather, he must show a reasonable probability that counsel's unprofessional errors adversely affected his defense. A reasonable probability is one that undermines this court's confidence in the outcome. ***Id.*** at 693-94.

¶9 George's claims of ineffective assistance of trial counsel fall into several categories, none of which support any basis for relief. First, a number of issues raised in his postconviction motions were not pursued on appeal. They are deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Adver. Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). Other allegations of ineffective assistance are raised on appeal that were not raised in his motions in the trial court and/or were not brought up at the postconviction hearing. Those issues are deemed waived. To preserve an issue for appeal, trial counsel must be asked at the postconviction hearing to explain his rationale and strategy regarding specific allegations of deficient performance. *See* ***State v. Machner***, 92 Wis. 2d 797, 804-05, 285 N.W.2d 905 (Ct. App. 1979).

¶10 Several of George's claims of ineffective assistance failed because he did not call appropriate witnesses at the postconviction hearing. The only witnesses called at the postconviction hearing were George, his trial attorney and an Appleton police officer who investigated the uncharged earlier incidents of sexual assault and intimidation by weapons. None of these witnesses' testimony established trial counsel's deficient performance or prejudice. George alleges ineffective assistance because his counsel failed to investigate some defenses, did not call witnesses to support those defenses and did not effectively cross-examine James M.S. about drinking and drug use. He faults his counsel for not producing jail inmates to impeach James M.S.'s testimony and for not locating other motel guests to learn whether they heard anything during the assaults. To prevail on these issues, George was required to call these witnesses at the ***Machner***[2] hearing to establish that they were willing to testify and that they would have provided exculpatory information. Without the testimony from these witnesses, it would be pure speculation to conclude that his defense was prejudiced by his counsel's failure to present their testimony.

¶11 Several of George's claims of ineffective assistance fail because he has established no prejudice from his counsel's decisions. Counsel's failure to introduce a knife or the phone records from the hotel, his failure to call certain witnesses, and his failure to ask James M.S. whether he was disabled were explained by his trial counsel at the ***Machner*** hearing. Counsel's decisions constituted reasonable strategic choices. ***Strickland***, 466 U.S. at 690. In addition, these and many other specific complaints raised in George's brief were

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

substantially inconsequential and do not undermine this court's confidence in the outcome. ***Id.*** at 694.

¶12 George faults his attorney for not calling an administrative law judge who doubted James M.S.'s story. He also argues that counsel failed to present evidence about police policies regarding referral to the Rape Crisis Center, suggesting that the police officers did not believe the accusations. That testimony would have violated the ***Haseltine*** rule. It is the jury's function, not the witnesses', to decide James M.S.'s credibility. Counsel was not deficient and George was not prejudiced by his counsel's failure to attempt to introduce inadmissible evidence.

¶13 Finally, George argues that his trial counsel was not certified by the state public defender to handle class B and class C felony cases. His attorney was authorized to practice law in Wisconsin and was assisted by another attorney. Contrary to George's implicit assertion, the lack of state public defender certification does not establish deficient performance or prejudice as a matter of law. Because George has not established deficient performance or prejudice from his counsel's conduct in this case, there is no basis for granting a new trial.

By the Court.—Judgment and order affirmed.

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