

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0352-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF000834

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEBASTIAN MOLINA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Sebastian Molina appeals from an order denying postconviction relief. The only issue on appeal is whether he received ineffective assistance of counsel. He moved for an order staying briefing and remanding the case to the trial court for a supplementary postconviction motion hearing. We

deferred decision on the motion until briefing was completed. We affirm the postconviction order and deny the motion for remand.

BACKGROUND

¶2 Molina was convicted of three counts of sexual assault of a person under the age of thirteen. The sexual acts he was charged with were repeatedly penetrating the victim's vagina and anus with his penis, hand to vagina contact, fellatio, and cunnilingus. The police seized incriminating evidence from his bedroom, including his computer that had images of adult pornography. Stacy Laufenberg, a sexual assault nurse, examined the victim and testified at trial.

DISCUSSION

¶3 To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Performance is deficient if it falls outside the range of professionally competent representation. *See id.* We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See id.* Prejudice results when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 642. We presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 637. We review de novo whether performance was deficient and prejudiced the defendant, but affirm the trial court's findings of fact unless clearly erroneous. *Id.* at 633-34.

Cross-Examination

¶4 Molina contends that his attorney failed to object to an improper cross-examination question by the prosecutor. The question asked of Molina was, “Well, have you ever lied?” Molina argues that this question was improper character evidence, irrelevant, and highly prejudicial. He claims that his credibility was critical at trial and that it was not reasonable for his attorney not to object. He also argues that “[i]t could be said that defense counsel ... was not paying attention to the trial.”

¶5 The State contends that the question was proper because it impeached Molina and was not offered as character evidence. Molina’s trial counsel explained that he did not object to the question because he believed it did not have much impact on Molina’s credibility. He reasoned that everybody tells insignificant lies sometimes. He explained his strategy at the postconviction hearing:

I knew that [the prosecutor] was about finished questioning [Molina] and I was just going to follow up, and said—well, in fact, I did that, are you lying about having—not having sex with [the victim], and [Molina] answered I’m not lying about that. So I didn’t see that the question was harmful because I followed up on this directly, and I knew I was going to do that.

The State argues that no reasonable litigator objects whenever possible. It also notes that Molina’s speculation that counsel may not have been paying attention is unsupported and without merit.

¶6 We conclude that it was reasonable for Molina’s counsel to refrain from objecting. An objection draws the jury’s attention to a question. Counsel was in a difficult position and made a reasonable decision to rehabilitate

credibility on redirect. We agree with his counsel that this single question was not as critical to Molina's credibility as he contends. Molina also has not established that the record shows his counsel may not have been paying attention. In fact, counsel's redirect examination shows that he was aware of the prosecution's line of questioning.

Nurse's Testimony

¶7 Molina contends that his trial counsel should have objected to Laufenberg's testimony as improper expert opinion. She testified that the victim tolerated the intrusive medical examine unusually well, which was consistent with her having been previously penetrated vaginally and anally. She stated that she did not find any signs of injury or damage to the victim's genitals or anus. She also testified about the victim's hymen and estrogen levels:

A. It was difficult to assess her hymen because of the shape and the estrogen around her hymen, so I wasn't able to determine if the hymen was intact or not.

....

Q. What's the significance of [the estrogen], if any?

A. That she was able to tolerate penetration or that with the estrogen there you're not always able to notice if there is any injury because of the folds and that the hymen is like plump.

She also stated that the presence of estrogen "could" be consistent with repeated vaginal penetrations.

¶8 Molina asserts that the testimony about estrogen levels was a complete surprise to his counsel because the prosecutor did not disclose it prior to trial. He argues that his counsel should have moved for an adjournment or mistrial

so that he could obtain his own expert witness to rebut Laufenberg. He also argues that Laufenberg's testimony lacked foundation and was inadmissible hearsay.

¶9 The State concedes that the testimony about estrogen was not disclosed prior to trial and that Molina's counsel could have objected to the testimony. It argues, however, that his counsel had good reasons to let the testimony stand. Counsel explained that he considered Laufenberg helpful because she established that there was no evidence that the victim's hymen was damaged or absent. Counsel also undermined the significance of the estrogen levels by arguing at closing that the estrogen was not evidence of rape, but merely that the victim was beginning puberty.

¶10 Molina fails to prove either deficiency or prejudice. We agree that Laufenberg's testimony was helpful, not detrimental, to Molina. She testified that she did not observe any damage or injury to the victim's genitals or anus and was unable to determine if the hymen was intact. Counsel's trial strategy was not deficient. Moreover, Molina's prejudice claim is speculation. He has not demonstrated that his attorney could have produced expert testimony that would have rebutted Laufenberg. Similarly, he has not demonstrated that his attorney could have successfully attacked the foundation of her testimony. He only raises unanswered questions about the foundation of Laufenberg's testimony. A prejudice claim based purely on speculation will not prevail. *See State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

Pornography

¶11 Molina asserts that his attorney should have filed a motion in limine to exclude the pornography found on his computer. He argues that such evidence

was irrelevant, improper character evidence, and highly prejudicial because it portrayed him as a social deviant.

¶12 At the postconviction hearing, his counsel explained why he did not object to the evidence:

I didn't consider it especially damning about anything, but as soon as I make a big deal out of it, then it just registers more in the jury's mind.... I didn't consider it—it as indicative of anything but that there was some kind of adult images on the hard drive.

¶13 The State contends that the evidence did not prejudice Molina. It argues that the evidence was relevant because it corroborated the victim's testimony that he had shown her such images on his computer. It also argues that the evidence did not constitute other act evidence because it was part of the conduct charged.

¶14 We conclude the pornographic images did not unfairly prejudice Molina. The images, which were only of adults, supported Molina's assertion that he considered only adults sexually attractive, not children. Moreover, the evidence had probative value because it corroborated the victim's testimony. For these reasons, it was not unreasonable for counsel to refrain from objecting to this evidence.

Motion for Remand

¶15 Molina moved for an order staying briefing and remanding the case to the trial court for a supplementary postconviction motion hearing. He asserts the remand is necessary to gather information about the foundation for Laufenberg's testimony:

At this supplementary post-conviction motion hearing counsel intends to call as a witness Nurse Laufenberg to determine how exactly she was able to base her opinion about the presence of elevated estrogen levels on the victim, i.e. did she draw the conclusions from a visual exam?; were any lab tests of the victim done to reach this conclusion?...

... [I]t will be demonstrated that Nurse Laufenberg could not have made and reached the conclusion she did about estrogen levels on sight alone.

¶16 We deny Molina's motion for remand because it is based on speculation. His failure here is the same one we discussed above. He merely speculates that additional cross-examination will produce relevant evidence. We will not order a new hearing that simply permits Molina to go on a fishing expedition.

By the Court.—Order affirmed.

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

