COURT OF APPEALS DECISION DATED AND FILED

March 29, 2011

A. John Voelker
Acting 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. 2009AP3044-CR

Cir. Ct. No. 2006CF70

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS G. HICKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: MICHAEL JUDGE, Judge. *Order reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Douglas G. Hicks appeals a judgment convicting him of repeated sexual assault of the same child, Eric J. He also appeals an order denying his postconviction motion in which he challenged the admissibility of an

incriminating statement and alleged ineffective assistance of counsel for failing to object to the State's use of the statement and for failing to object to the prosecutor's closing argument regarding other crimes. The circuit court denied the postconviction motion, concluding that statements Hicks made to Eric during a one-party consent phone call were voluntary and that counsel's decision not to object to the State's closing argument constituted a reasonable trial strategy. We reject the closing argument issue. However, because we conclude that Eric was an agent of the police and engaged in improper coercive conduct, we reverse the order denying the postconviction motion and remand the matter for the circuit court to conduct the balancing test required by ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1985).

BACKGROUND

¶2 Hicks was Eric's former stepfather. In April 2005, Eric went to police and accused Hicks of sexually assaulting him numerous times between June 1996 and April 1999. Investigator Dale Janus arranged a phone call between Eric and Hicks with a goal of getting Hicks to make incriminating statements. The call was made from the police station where Janus monitored and recorded the conversation. Janus instructed Eric on how to perform the call and what to say to elicit incriminating statements. While Janus did not instruct Eric to threaten Hicks, he told Eric "there wasn't anything he could really say wrong."

¶3 When Hicks initially asked Eric whether they could talk later, Eric responded that he knew ex-KGB agents and that if Hicks did not talk to him now, he would have "like maybe 30 days to live." Eric stated "tell me you're sorry …. You won't have to worry about me sending someone after you, or have to worry about me finding your house and coming after you with a baseball bat or any shit

like that, just say it." During the forty-three minute conversation, Eric threatened Hicks approximately twenty times and Hicks denied the allegations seventy-nine times.

¶4 Ultimately, Eric threatened to tell Hicks's son, Alex, and threatened: "If you want to see your child again, if you don't want him to ever know about this, you're going to say it." Hicks responded: "Eric, I am sorry." Eric asked: "You're sorry for what? Come on, go forward, you're sorry for what." … "No, say I'm sorry for sexually molesting you. This isn't going to end until you reach that point. We got the sorry part out, now we just need to end the sexually molesting me part." Hicks replied: "That's going to keep you from uh, trying to upend, upend on Alex." Eric responded: "Yes it will if you want to see your child again, if you don't want him to ever know about this, you're going to say it. You're going to say Eric I'm sorry for sexually molesting you." Hicks then responded: "Eric, I'm sorry for molesting you."

¶5 Three weeks later, Hicks voluntarily met with Janus at the police station to discuss the accusation. Hicks denied molesting Eric and stated he felt intimidated by Eric because of Eric's threats. He said he told Eric what he wanted to hear.

DISCUSSION

¶6 Admission of involuntary statements at trial violates a defendant's right to due process. ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. To determine voluntariness, the pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person conducting the interrogation. ***Id.***, ¶37. Statements are voluntary if they are the product of free and unconstrained will, reflecting deliberateness of choice, as

opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceed the defendant's ability to resist. ***Clappes***, 136 Wis. 2d at 236. Courts apply a "totality of the circumstances" standard to determine whether statements are voluntary.

¶7 We conclude that, as a matter of law, Eric was acting as a police agent during the phone call and that he applied impermissibly coercive tactics to get Hicks to make incriminating statements. In ***State v. Lee***, 122 Wis. 2d 266, 276-77, 362 N.W.2d 149 (1985), the court applied a "totality of the circumstances" test to determine whether a citizen was acting as an agent of the police. The court identified four factors to consider when applying the test: (1) whether the citizen or the police initiated the first contact with police; (2) whether the citizen or police suggested the course of action; (3) whether the citizen or police suggested what was to be said; and (4) whether it was the citizen or the police that controlled the circumstances under which the citizen and the suspect met, whether the control was extensive or incidental. ***Id.*** Although Eric made first contact with the police, it was Janus who suggested making the phone call and who made all of the arrangements to monitor and record the conversation. The call was made for the express purpose of obtaining incriminating statements. Janus suggested that Eric request an apology for the abuse and told him there "wasn't anything he could really say wrong." Janus exercised substantial control over the call.

¶8 During the phone conversation, Eric applied impermissible threats of physical harm and psychological intimidation. He made threats that no police officer would be allowed to make in order to secure incriminating statements.

Police are not permitted to do indirectly through a citizen that which they are constitutionally prohibited from doing themselves. ***Lee***, 122 Wis. 2d at 280.

¶9 The State argues, and the trial court concluded, that Hicks could have terminated the discussion by simply hanging up. However, Eric threatened Hicks with physical harm and even death if he did so. The choice to continue the phone conversation in light of these threats cannot be considered a determinative factor when judging the voluntariness of the statement.

¶10 Because the circuit court concluded that Eric's tactics did not constitute improper coercion by a police agent, it did not apply the balancing test set out in ***Clappes***. When a defendant establishes coercive conduct, the court must weigh the defendant's personal characteristics against the coercive police conduct to determine whether the statements were voluntary. ***Clappes***, 136 Wis. 2d at 236-37. Because this balancing analysis was not performed, we remand the matter to the circuit court to consider the ***Clappes*** test in light of our conclusion that Eric, as a police agent, applied improper coercive tactics to secure Hicks's incriminating statements. We neither affirm nor reverse the judgment of conviction because the validity of the judgment depends on the outcome of the ***Clappes*** analysis.

¶11 Although we do not directly review the judgment of conviction, we address the issue regarding the prosecutor's closing argument for two reasons: (1) if the closing argument provided a basis for reversing the judgment, a new trial would be ordered regardless of the result of the ***Clappes*** hearing; and (2) if the circuit court grants a new trial after conducting the ***Clappes*** hearing, the prosecutor's error should not be repeated when the matter is retried.

¶12 In his closing arguments the prosecutor commented on the other acts evidence introduced at the trial. The State introduced evidence that Hicks had

previously molested two other boys, but the trial resulted in a hung jury. Hicks later entered an ***Alford***[1] plea to reduced misdemeanor charges. In his closing argument, the prosecutor asked the jury "And was that a fair resolution what happened? Plea bargaining it down to a couple misdemeanors. Is that what should have happened here or should we deal with this case?" That argument was improper because it served no purpose other than to invite the jury to convict Hicks in this case because he was not appropriately punished for the other crimes. The danger of the jury doing what the prosecutor suggested is precisely one of the reasons admissibility of other acts evidence is limited. *See* ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967).

¶13 However, the issue was not properly preserved because Hicks's counsel did not object to the argument. And Hicks's counsel was not ineffective because, as he explained at the postconviction hearing, he did not want to call further attention to the argument. The impermissible argument consists of three sentences in an eleven-page closing argument. Deciding not to call the jury's attention to the statement by objecting constitutes a reasonable trial strategy. Strategic decisions made with full knowledge of the facts and law are virtually unchallengeable. *See* ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984). Therefore, although the prosecutor's argument was improper, it does not provide a basis for reversal of Hicks's conviction.

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

By the Court.—Order reversed and cause remanded with directions.

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