**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 18, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP2087-CR** **Cir. Ct. No. 2006CF681**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RANDALL S. WERDIN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Randall S. Werdin appeals from a judgment, entered upon a jury verdict, convicting him of forty-two[1] counts of possession of child pornography and from an order denying his motion for postconviction relief. We agree with the State that the police search of Werdin's computer was lawful because regardless of whether his estranged wife had authority to consent to the search, they reasonably believed that she did. We also agree that Werdin's trial counsel was not ineffective. We affirm.

¶2 Werdin sought to file a complaint with the Oshkosh Police Department that his computer equipment was stolen. Werdin told Officer Matthew Harris that he believed his wife, Michelle, was the one who stole the computers from him. The Werdins were in the process of getting divorced.

¶3 Harris contacted Michelle. She told Harris that, as her husband had the computers password-protected, she took them to her workplace so a technician there could help her access her personal files. Harris independently confirmed that the divorce was not final and checked Werdin's criminal history. Werdin had two convictions for exposing his genitals. During a later conversation, Michelle told Harris she suspected that the computers contained illegal material. Michelle brought the computers and an external disc drive to the police station. She told Detective James Busha that she thought they might contain child pornography and signed a form allowing police to search their contents.

¶4 The next day, Busha informed Werdin by telephone that they had his computers and were going to analyze them. Werdin's only response was to ask if

[1] One of the original forty-three counts was dismissed at trial on the State's motion.

an arrest warrant had been issued. When Busha told him no, "[Werdin] said fine and hung up." Analysts from the Wisconsin Division of Criminal Investigations discovered 128 images depicting minor children in sexual poses.

¶5 Werdin moved to suppress the evidence found during the search of the computers on grounds that Michelle did not have the authority to consent to their search. Werdin attached a copy of Harris' March 28, 2005 police incident report to his motion to suppress. It indicated that, after reviewing documents Werdin provided relating to the pending divorce and conferring with two other officers, Harris concluded Michelle was in technical compliance with a temporary court order. The report concludes:

> At this time the information given to Randall is that the computers are in fact not stolen, that his wife Michelle has them at her work and that he will have to contact his attorney because this is a civil matter. At this time the information given to Michelle is that although she may be in violation of the temporary order, she has rights to these computers as they are technically still marital property.

¶6 The court denied Werdin's suppression motion. A jury found him guilty. He moved for a new trial, claiming ineffective assistance of trial counsel. The court denied the motion after a ***Machner***[2] hearing. Werdin appeals.

¶7 Werdin first argues that the police violated his Fourth Amendment rights when they conducted a warrantless search of his computers based only upon his estranged wife's consent, and despite his report that she had stolen them.

¶8 Warrantless searches generally are per se unreasonable under the Fourth Amendment subject to only a few limited exceptions. ***State v. Kieffer***, 217

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

Wis. 2d 531, 541, 577 N.W.2d 352 (1998). "[C]onsent to search may be 'obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" ***State v. Tomlinson***, 2002 WI 91, ¶23, 254 Wis. 2d 502, 648 N.W.2d 367 (quoting ***United States v. Matlock***, 415 U.S. 164, 171 (1974)). The State bears the burden of proving by a preponderance of the evidence that the search and seizure fall within the third-party consent exception. ***State v. St. Germaine***, 2007 WI App 214, ¶16, 305 Wis. 2d 511, 740 N.W.2d 148. "[I]t is the sufficiency of the consenting individual's relationship to the premises [or effects] to be searched, that the State must establish." ***Kieffer***, 217 Wis. 2d at 542. Whether the facts satisfy the constitutional requirement of reasonableness is a question of law which this court reviews independently. ***Id.*** at 548.

¶9 According to the undisputed evidence, Werdin reported the theft of his two computers, he believed his wife had taken them, he considered them his by virtue of a temporary divorce order and Michelle told police that she took the computers from their joint home to access personal documents but grew increasingly concerned about their content. The evidence also showed that Harris verified that the divorce was not final, reviewed the divorce documents, consulted with other officers and advised both parties that the computers were marital property. These facts reasonably suggest that Michelle had authority to consent to a search. The third-party exception to the warrant rule includes situations based upon the consent of a third party reasonably believed by the police, at the time, to possess apparent common authority over the items at issue. ***St. Germaine***, 305 Wis. 2d 511, ¶¶15-16.

¶10 Werdin also asserts that he objected to the search. The record does not support that claim. Informed that the computers would be analyzed, he

reasonably could infer that Michelle authorized a search. Still, he asked only about an arrest warrant and hung up. When a party later claiming exclusive authority over property is silent in the face of another's consent to search it, and makes no claim that the third party lacks authority to consent, it is reasonable for the police to believe that the consenting party has authority to do so. ***Id.***, ¶¶21-23.

¶11 Werdin next argues his trial counsel, Attorney Leonard Kachinsky, was ineffective in several respects. Thus, Werdin must demonstrate that Kachinsky erred so seriously that he was not functioning as the "counsel" guaranteed to him by the Sixth Amendment and that this deficient performance prejudiced the defense so seriously as to deprive Werdin of a fair trial, a trial whose result is reliable. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶12 The test for deficient performance is whether counsel had a reasonable basis for the challenged acts or omissions. *See* ***State v. Rock***, 92 Wis. 2d 554, 560, 285 N.W.2d 739 (1979). Deficient performance and prejudice both present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the trial court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo**.** ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶13 Werdin first asserts that Kachinsky should have objected to Michelle's testimony about letters she claimed Werdin wrote to their son. Michelle testified that one letter said that Werdin needed to create as much doubt as possible for the jury; the other said that if the son accepted blame for the downloaded files, as a minor he likely would get "little more than a slap on the

wrist." She said she did not produce the letters to the prosecutor because she initially feared damaging her relationship with her son and later the letters were destroyed in a flood.

¶14 Werdin does not suggest a legal basis on which the letters might have been excluded. Indeed, evidence of an attempt to suborn perjury was relevant and admissible as it tended to show Werdin's consciousness of guilt. *See* ***State v. Amos***, 153 Wis. 2d 257, 272-73, 450 N.W.2d 503 (Ct. App. 1989). The letters also were Werdin's own statements offered against him. *See* WIS. STAT. § 908.01(4)(b)1. (2009-10).[3] Trial counsel therefore was not deficient for failing to object. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Furthermore, Kachinsky testified that he found Michelle's claim that the letters were lost in a flood so "implausible," "fishy" and "preposterous" that it could serve to undermine her credibility. His decision not to object strategically fit with the defense theory that Michelle was a vindictive estranged spouse who herself may have planted the pornography in an effort to gain custody of their son. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

¶15 Werdin next assails Kachinsky's failure to try to curb the scope of other-acts testimony offered at trial. The trial court granted the State's pretrial motion to permit evidence of the two incidents in which Werdin had exposed himself to young girls. One incident involved an eight- and nine-year-old; the other involved a thirteen-year-old. Kachinsky's predecessor counsel objected. At

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

trial, the State called the three girls and the two investigating officers as witnesses. Werdin contends that Kachinsky should have requested a limitation on the number of witnesses and the scope of their testimony.

¶16 Werdin does not specify which witness or which part of the testimony was superfluous. The girls succinctly and factually described the encounters. The officers described how Werdin's identity was verified; one testified that Werdin admitted exposing himself in the first incident. Kachinsky testified that, as the witnesses' testimony unfolded, he was "looking to eliminate anything that became unduly cumulative." His trial strategy was reasonable.

¶17 We disagree that requesting some sort of limitation would have made it "reasonably probable" that the jury would have been more open to evidence supportive of reasonable doubt. First, the jury still would have known that Werdin was positively identified as having exposed himself to three young girls—evidence he acknowledges had an "overwhelming emotional impact" on the jury. Second, that argument presumes that the court would have granted Kachinsky's request. That seems a stretch, since the decision is discretionary, *see* ***State v. Hammer***, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d 629, and the court already ruled that it would allow other-acts evidence. Third, the trial court ameliorated the risk of unfair prejudice by giving an appropriate cautionary instruction. *See* ***id.***, ¶36.

¶18 Werdin has not persuaded us that, but for Kachinsky's failure to try to limit this evidence, there is a reasonable probability that the result of the trial would have been different. Some conceivable effect on the outcome is not enough. *See* ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999).

¶19 Werdin next asserts that Kachinsky failed to ensure the seating of an impartial jury. During voir dire, the potential jurors were asked whether "just knowing the nature of the charge" would make it difficult for any of them to sit on the jury. One responded that her husband's sisters were "still struggling with something that has happened like this to them in the past and … right now I'm even upset about it." After further questioning by the prosecutor and the court, the woman confirmed that she could suspend decision-making until hearing all the evidence. She remained on the panel.

¶20 Kachinsky testified that the juror's demeanor and final answer left him confident she could be fair and unbiased. "[A] prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." ***Erickson***, 227 Wis. 2d at 776. He also testified that he saw no likelihood of success in having her stricken for cause and that he used the peremptory strikes on prospective jurors he deemed more detrimental to the defense. Kachinsky's strategy was reasonable. Werdin asserts that it is "reasonably probable" that the outcome of the proceeding would have been different if Kachinsky requested she be removed for cause. That strikes us as highly speculative. Showing prejudice requires more than speculation. ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶21 Next, Werdin asserts that Kachinsky failed to effectively impeach Michelle's trial testimony. He claims that Kachinsky could have diminished Michelle's credibility and underscored that she had a motive to plant the pornographic images by questioning her more vigorously about the allegedly contentious custody battle and divorce, exploring whether a restraining order she unsuccessfully sought was based on false allegations and led to her decision to deliver the computers to the police, and asking about the son's Social Security

benefits received because of Werdin's disability and about "the numerous times she had threatened" Werdin.

¶22 Werdin ignores that questioning Michelle about her desire to have sole custody just as easily could have highlighted his status as a convicted sex offender. He also ignores that probing the matter of the restraining order application could have opened the door to questions about domestic violence. Further, Michelle had testified that she brought the computers to the police station because Werdin's continuing demands that she return them strengthened her suspicions about their contents. Werdin also does not suggest how Kachinsky might have argued that, if Michelle was awarded custody, the son's Social Security benefits would be a windfall to her rather than funds necessary for his care, given Werdin's limited ability to contribute to his support. Finally, Werdin does not explain how Michelle "threatened" him.[4] He has not demonstrated, therefore, that Kachinsky performed deficiently. Likewise, he fails to make a specific showing that questioning along these lines would have accomplished the desired result and altered the outcome of the proceeding. *See* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999).

¶23 Werdin's last claim of ineffectiveness is that Kachinsky failed to object when the photographs were verbally described at trial. The parties stipulated that the photographs forming the basis for the charges were pornography and depicted minor children, and would not be shown to the jury. The State's expert recited the dates of creation and of last access for each of the

[4] If Werdin is referring to Michelle's alleged statement to the effect that she was going to get him back for ruining her life, Kachinsky did question her about that.

forty-two photographs. For the last fifteen, he also verbally described the child's pose, state of undress and genital exposure. Werdin contends those descriptions were unduly inflammatory and negated any benefit gained by not displaying the photos themselves.

¶24 The parties' stipulation quells this attack. It provided:

> [T]he defense has agreed that the content of all of the images meet the definition of child pornography and therefore agrees to stipulate to that particular element of the offenses charged … *and the parties agree that images will be described in words to the jury but the images themselves will not be shown*. (Emphasis added.)

Werdin personally agreed to the stipulation and appellate counsel does not take issue with it. The stipulation constitutes a waiver of any right to object on appeal that the images were described in words.

¶25 In addition, Kachinsky testified that he did not object because he did not think the court would sustain his objection. We must conclude he is correct. The trial court specifically stated in its oral ruling: "Since it was stipulated to, Attorney Kachinsky was not ineffective in not objecting to the description." We thus see no merit to this challenge.

*By the Court*.—Judgment and order affirmed.

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