COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP752-CR **Cir. Ct. No. 2007CF106**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL G. ZARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waushara County: GUY D. DUTCHER, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Paul Zarter appeals from a judgment convicting him of repeated sexual assault of the same child and sexual intercourse with a child age sixteen or older, and from an order denying his motion for postconviction relief. He claims that he was denied: (1) the effective assistance of

counsel in pretrial matters; (2) his right to have counsel at trial; (3) his right to compulsory process to secure witnesses; and (4) his due process right to have sufficient time to prepare for trial. For the reasons discussed below, we reject each of Zarter's claims and affirm.

BACKGROUND

¶2 The State charged Zarter with one count of sexual intercourse with a child and one count of repeated sexual assault of a child based upon allegations that he had an ongoing, consensual, sexual relationship with a neighbor girl beginning when she was fourteen years old. The girl reported the sexual activity to police when she was sixteen, after she broke up with Zarter and he began leaving her voicemails threatening to kill her and her new boyfriend.

¶3 Two weeks prior to the first scheduled trial date, Zarter's appointed counsel moved to withdraw at Zarter's request so that Zarter could attempt to find his own attorney. The circuit court was skeptical that Zarter would be able to afford to retain private counsel, and it noted that the state public defender's office generally allows one substitution of counsel. The court further advised Zarter that the court would not appoint counsel at county expense because the defendant was eligible for public defender representation. The court ultimately allowed Zarter to discharge his attorney, postponed the trial based upon the withdrawal of Zarter's speedy trial demand, and informed Zarter that the public defender's office would appoint a new attorney to represent him if he had not found his own attorney within thirty days.

¶4 Zarter was unable to retain his own attorney. The public defender's office appointed a second attorney for him, and a new trial date was set.

¶5 Three weeks before the rescheduled trial date, Zarter moved to discharge his second attorney. The second attorney informed the circuit court that he and Zarter could not agree "concerning the rape shield law and approaches to attacking the credibility of the victim." When the circuit court asked if Zarter understood that no additional attorneys would be appointed and that Zarter would have to represent himself if he discharged his second attorney, Zarter responded that he did not want to try the case on his own, but wanted counsel to "do his job." The court expressed concern that Zarter was attempting to discharge one attorney after another either as a delay tactic or in order to find one "who's willing to do the things that the Court would not allow an attorney to do, in any event, and which an attorney is ethically prohibited from doing." The court obtained the second attorney's agreement to serve as standby counsel if discharged, noted that it had the authority to make a finding that a defendant had forfeited the right to counsel by conduct, and took the matter under advisement.

¶6 At the next hearing, the circuit court engaged Zarter in a colloquy to make sure he understood that an attorney has an ethical obligation to follow the rules, even if it is not what the client wants the attorney to do. The court told Zarter that if he discharged his second attorney, the court would find that he had forfeited his right to counsel by failing to cooperate, and neither the public defender's office nor the court would appoint a third attorney. The court then allowed Zarter to explain his dissatisfaction with his second attorney. Upon determining that Zarter's complaints were without merit, the court refused to allow counsel to withdraw.

¶7 At the next pretrial conference, however, Zarter again told the circuit court that he wanted to discharge counsel. Counsel explained that Zarter was unwilling and/or unable to relinquish control over what evidence to introduce and

which questions to ask. The court again warned Zarter about the difficulties of proceeding pro se. The court explained that the rules of evidence prohibit the introduction of irrelevant material or information about a victim's past sexual history, and that Zarter would not be able to introduce such information if he were representing himself any more than if counsel were representing him. Although Zarter indicated that he understood, he reiterated that he wanted someone to represent him as "they are supposed to do" and complained that counsel had threatened to ensure that Zarter received the maximum sentence. The court flatly rejected Zarter's version of his conflict with counsel, found that Zarter was motivated at least in part by a deliberate desire to delay the proceedings, and concluded that he had forfeited his right to counsel by refusing to cooperate with counsel or accept counsel's professional judgment. In particular, the court observed that Zarter had "absolutely sabotaged the representation of two highly competent criminal defense attorneys" and opined that Zarter would "have a conflict with any attorney … to the point where that attorney [could] not represent [him]."

¶8 The court further determined that Zarter was competent to represent himself based upon his interactions with the court and his work history. The court directed Zarter to provide the court at the next hearing with a list of witnesses, including summaries of each witness's anticipated testimony, which the court would review in camera before issuing subpoenas.

¶9 Zarter did not present the requested witness list and summaries. At the final pretrial conference three days later, Zarter complained that he had no means of contacting his potential witnesses and didn't have enough time to prepare summaries of their anticipated testimony. The court indicated that three

days should have been sufficient to comply with its directive and refused to issue subpoenas on Zarter's behalf without the summaries.

¶10 Zarter represented himself at trial. He did not take the stand, and the only witness he called was the victim. Zarter also inquired about the availability of Kirk Giese, a potential witness. The State explained that Giese had initially been on the State's witness list, but the State had released him from subpoena upon deciding not to call him. Zarter did not make any additional requests during trial to subpoena Giese or any other witness.

¶11 After the jury found Zarter guilty, the circuit court entered a judgment of conviction sentencing him to sixteen years of initial confinement and fourteen years of extended supervision. Zarter filed a postconviction motion seeking a new trial based upon alleged ineffective assistance of counsel in failing to contact potential witnesses, denial of Zarter's right to counsel at trial, denial of compulsory process to secure witnesses, and violation of his due process right to have sufficient time to prepare for trial. Following a hearing, the circuit court denied the motion. Zarter appeals, raising the same issues.

DISCUSSION

Pretrial Assistance of Counsel

¶12 "The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant." ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citation omitted). Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the

circuit court's findings about counsel's actions and the reasons for them unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

¶13 Zarter contends that counsel provided ineffective assistance by failing to contact any of the thirteen potential witnesses Zarter identified for him. Zarter made an offer of proof that one of those witnesses would have testified that there were people staying in every bedroom of Zarter's trailer over a Labor Day weekend when the victim alleged sexual activity had occurred, and that it would have been impossible for the victim to have spent a night in Zarter's bed without any family members seeing her. He would have further testified that the victim was not present at a birthday celebration and was present for only a limited time during the following weekend, on which dates the victim alleged additional sexual activity occurred.

¶14 However, counsel testified at the ***Machner***[1] hearing that he went over the proposed witness list with Zarter, one by one. Counsel testified that Zarter told him none of the witnesses were present with him and the victim in the trailer at the time of the alleged sexual activity, and that none of them had any specific recollection of details about the alleged dates. Counsel explained that Zarter told him he wanted the witnesses to testify primarily about the victim's prior sexual relationships and drug use. Counsel believed such evidence would

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), sets forth the procedure for evaluating claims of ineffective assistance of counsel.

not only be largely inadmissible, but also contrary to the defense strategy. Even if a proposed witness might have had some information on sleeping arrangements during a particular weekend, counsel did not want to present any witnesses that might corroborate any part of the victim's testimony or suggest that Zarter and the victim shared a boyfriend/girlfriend relationship. Nor did counsel want to risk alienating the jury by attacking the victim too harshly. Rather, counsel wanted to show that Zarter had more of a father/daughter relationship with the victim and to highlight the eight different accounts the victim had given to gently suggest that she had fabricated the story out of anger stemming from family dynamics.

¶15 We agree with the circuit court that counsel was not obligated to contact potential witnesses just because the defendant wanted him to do so, without reason to believe they would offer evidence helpful to the defense counsel reasonably planned to present. Therefore, we are not persuaded that counsel's performance was deficient.

Forfeiture of Counsel

¶16 The constitutional right to counsel may be relinquished either by an affirmatively made waiver by the defendant or by operation of law resulting from the defendant's actions. ***State v. Cummings***, 199 Wis. 2d 721, 756, 546 N.W.2d 406 (1996). Here the circuit court determined that Zarter had forfeited his right to counsel by operation of law.

¶17 "The triggering event for forfeiture is when the court becomes convinced that the orderly and efficient progression of the case is being frustrated by the defendant's repeated dissatisfaction with his or her successive attorneys." ***State v. Coleman***, 2002 WI App 100, ¶17, 253 Wis. 2d 693, 644 N.W.2d 283 (citations and brackets omitted). To establish a valid forfeiture, a court should:

(1) provide the defendant with an explicit warning that he will forfeit the right to counsel and have to represent himself if he persists in specific conduct; (2) engage in a colloquy to ensure that the defendant has been made aware of the difficulties and dangers of self-representation; (3) make a clear ruling when the court deems the right to counsel to have been forfeited; (4) make factual findings to support the ruling; and (5) further determine that the defendant is competent to proceed without counsel. ***Id.***, ¶¶22, 34.

¶18 Here, the circuit court made a factual finding that counsel had acquiesced to Zarter's desire to discharge him, rather than counsel seeking to withdraw over Zarter's objection. The court further found that Zarter's primary disagreement with counsel was counsel's refusal to pursue a line of defense that would have violated the rape shield law. The court noted that it had warned Zarter repeatedly that if he persisted in frustrating the process and attempting to discharge his second attorney rather than cooperating with him, he would have to represent himself, and that it had also warned him of the dangers of doing so. The court concluded that Zarter had sabotaged his relationships with two attorneys, creating a completely untenable relationship that culminated in Zarter's inability to control himself in the courtroom. The court concluded that the appointment of any additional attorneys would have the same result. Finally, the court found that Zarter was sufficiently competent to represent himself at trial.

¶19 In sum, the record demonstrates that the circuit court properly followed all of the required steps set forth in ***Cummings*** to support its determination that Zarter's ongoing dissatisfaction and inability to cooperate with successive attorneys was frustrating the orderly progression of the case and warranted the forfeiture of counsel.

Compulsory Process to Secure Witnesses

¶20 The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to compulsory process to secure witnesses for trial. ***State v. Kramer***, 2006 WI App 133, ¶22, 294 Wis. 2d 780, 720 N.W.2d 459. We will independently determine whether a defendant has been denied his right to compulsory process as a question of constitutional fact. ***Id.*** However, the right to present a defense is also subject to a harmless error analysis. ***Id.***, ¶26. "If it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error, then the error did not contribute to the verdict, and is therefore harmless." ***Id.*** (citations and brackets omitted).

¶21 Zarter complains that the circuit court denied him his right to compulsory process by requiring, with only three days' notice, that he provide the court with written summaries of the anticipated testimony of witnesses for whom he sought subpoenas. For purposes of discussion, we will set aside questions such as whether Zarter actually provided the court with the names of those he wished to subpoena and why he could not have provided the court with some generalized statements, such as those he provided to counsel, to explain what testimony he hoped his prospective witnesses could provide. We will also assume for the sake of argument that three days was insufficient time for Zarter to contact his potential witnesses to get more specific statements from them given his phone limitations in prison. We nonetheless conclude that any error was harmless.

¶22 Zarter provided an affidavit from only one of the potential witnesses he claims should have been subpoenaed: his nephew, Zack Zarter. The nephew averred that "there were people staying in every bedroom" of his uncle's trailer, as well as in tents outside, over Labor Day weekend in 2005. This averment may

have contradicted the victim's account that people left after a bonfire and did not stay overnight in the trailer. However, the nephew did not claim that he himself had slept in the trailer the entire weekend, and he could not have testified as to what other people might have seen. We therefore see little likelihood that the nephew's generalized statement that there were multiple people in and around the trailer on Labor Day weekend of 2005 would have undermined the victim's account that she had sex with Zarter while alone with him in Zarter's bedroom at some point during that weekend.

¶23 Similarly, the nephew's statement that his uncle had attended a birthday gathering in Oshkosh, at which the victim was not present, on one of the days she alleged sexual activity occurred does not preclude the possibility that Zarter and the victim had sex upon his return, or that she celebrated his birthday with him on a day other than his actual birthday. The victim did not claim that she had been at the party in Oshkosh.

¶24 Finally, the nephew's assertion that there were people sleeping in every bedroom of Zarter's trailer the weekend following his uncle's birthday was not necessarily inconsistent with the victim's testimony that on a typical weekend people would "flop into" every available bed in Zarter's trailer around two or three in the morning after drinking and partying. Again, the nephew's proffered testimony would not have precluded the possibility that Zarter and the victim were alone in the bedroom at some point prior to other people going to sleep there, or even while there were other people present who were passed out or sleeping heavily.

¶25 The limited relevance of the nephew's proffered testimony must be weighed against the overwhelming evidence of Zarter's guilt produced at trial. In

addition to the victim's first-hand account of their two-year relationship, the State introduced portions of the victim's diary in which she contemporaneously discussed her feelings for Zarter and his anger over discovering that she also had a teenage boyfriend. The victim's mother testified that her daughter spent a lot of time with Zarter and that, when asked if he was having an affair with her daughter, Zarter responded that they might have had sex while they were both drunk, and if the mother turned him in he would kill himself. The victim's brother testified that he saw Zarter and his sister hugging a lot and that on one occasion he discovered them sleeping in the same bed. The victim's father testified that his daughter spent a considerable amount of time at Zarter's trailer and that on one occasion he found them embracing "like lovers."

¶26 A man for whom Zarter was performing construction work testified that when Zarter learned about the warrant for his arrest, he went into a rage, threw items around the work site, and said he "wasn't going to prison over any bitch." Zarter told his boss that the girl didn't have a problem with them having sex; it was her mother or others who were making an issue out of their relationship. Zarter threatened to kill "that fucking bitch" and the "fucking nigger" she was with, and asked his boss if he could borrow a shotgun. Based on Zarter's outburst, the boss was so concerned about the victim's safety that he contacted the police.

¶27 The victim's mother also testified about a restraining order the victim obtained against Zarter based upon threatening messages Zarter left on the victim's voicemail after learning that she was seeing someone else. The State produced a police-made copy of some of the threatening voicemail messages Zarter had left on the victim's phone.

¶28 In sum, we see no reasonable probability that the jury would have reached a different verdict based on additional testimony regarding sleeping arrangements on a handful of occasions. Such testimony has little significance in light of the victim's testimony that she and Zarter had intercourse on many occasions over the course of two years and that it was difficult to distinguish the details of each occurrence, the statements that Zarter made to at least two other people that seemed to acknowledge a sexual relationship with the victim, and Zarter's threatening and violent behavior upon learning that the victim was seeing someone else.

Due Process Right to a Fair Trial

¶29 The Due Process Clause of the Fifth Amendment guarantees a criminal defendant a fair opportunity to defend against the State's accusations at trial. ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973); ***State v. Whittemore***, 166 Wis. 2d 127, 136, 479 N.W.2d 566 (Ct. App. 1991). Zarter contends that the circuit court violated his right to fairly defend himself by requiring him to proceed to trial six days after counsel was discharged.

¶30 As the State points out, however, Zarter did not ask for a continuance when the court indicated that the matter would proceed to trial. Moreover, it was plain from several of the pretrial proceedings that Zarter had already reviewed many, if not all, of the discovery materials with counsel. Zarter used those discovery materials to cross-examine the victim about inconsistencies in her statements, her recantation of an earlier allegation, and her possible motivation to fabricate. Zarter has not identified any additional item of discovery that he was unable to review prior to trial, much less described how it would have altered his defense at trial. We have already explained why Zarter has failed to

show prejudice based upon his inability to contact witnesses. Therefore, we again conclude that, if it was error for the court to proceed to trial six days after Zarter discharged counsel and forfeited the right to successor counsel, it was harmless given Zarter's actual preparation for trial, the overwhelming evidence of his guilt, and Zarter's failure to show what he would have done differently with more time.

By the Court.—Judgment and order affirmed.

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