COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2790-CR **Cir. Ct. No. 00CF000514**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES R. C.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles R. C. appeals a judgment convicting him of sexually assaulting his daughter and an order denying his postconviction motion alleging ineffective assistance of counsel. He argues that: (1) the trial court erroneously exercised its discretion when it precluded his girlfriend, Julie Aslin, from testifying due to their joint violation of a sequestration order; (2) the court

improperly required foundation expert testimony before it would allow lay witnesses to testify to the "normal" relationship between Charles and his daughter; (3) the prosecutor's closing argument was inflammatory, unsupported by the evidence and denied Charles a fair trial; (4) his fifteen-year sentence is excessive and constitutes double jeopardy because the court considered the pattern of behavior for which he was already incarcerated; and (5) he was denied effective assistance of counsel in numerous respects. We reject these arguments and affirm the judgment and order.

¶2 The victim alleged that Charles inappropriately touched her at his Outagamie County residence in August, 1999. She reported the assault six months later at which time she also disclosed a history of abuse occurring in Milwaukee and Calumet Counties. Before the trial in this action began, Charles was found guilty of assaulting the victim in Milwaukee County and was sentenced to twelve years in prison.

¶3 The trial court properly exercised its discretion when it precluded Aslin from testifying. The court found that Charles and Aslin violated the sequestration order when Charles told Aslin about the opening statements and the details of the victim's testimony. He advised her to exceed the scope of questioning if possible. Aslin also communicated with a court spectator. Whether a witness's testimony should be excluded for violation of a sequestration order is left to the trial court's discretion. *See* ***State v. Bembenek***, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983). Because the court reasonably found a willful and bad faith violation of the sequestration order that subverted the integrity of the adversarial process and the reliability of Aslin's testimony, the court appropriately refused to allow her to testify. *See* ***Taylor v. Illinois***, 484 U.S. 400, 411 (1988). The trial court could reasonably conclude that Charles' proposed remedy to allow

Aslin to testify and expose the violations of the sequestration order on cross-examination was not sufficient to restore the integrity of the process and the reliability of her testimony.

¶4 Charles argues that the court was not fully aware of the nature of Aslin's testimony, which it should have considered before reaching its decision. The victim indicated the assault occurred in mid-August, 1999. From motions and the opening statements, the trial court knew that Aslin would have provided an alibi for other dates. She would also have testified that the victim's description of the furnishings in the room where an assault took place was incorrect.

¶5 We reject Charles' argument. Had the trial court considered the content of Aslin's testimony before disallowing it, her testimony was not so exculpatory as to render the trial unfair based on disallowing her testimony. Aslin did not provide Charles with an alibi at the time of this offense. In addition, Charles himself could have provided other evidence to establish specific dates on which he had an alibi. Furthermore, Aslin's testimony would not have directly refuted the victim's testimony on any material question, but would merely have shown inconsistencies in the victim's memory of the furnishings during an assault that occurred months earlier. The nature of the victim's accusation, the long period over which these events occurred and the number of places in which Charles assaulted her rendered her ability to remember these details insignificant.

¶6 The trial court also properly required the defense to present expert testimony as a foundation for lay testimony that Charles and his daughter had a "normal" relationship. Expert testimony is required if the issue is beyond the general knowledge and experience of the average juror. *See* ***State v. Owen***, 202 Wis. 2d 620, 632, 551 N.W.2d 50 (Ct. App. 1996). Whether expert testimony is

necessary is a matter of law that we decide without deference to the trial court. ***Grace v. Grace***, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995). The defense argued that it is "within the common knowledge of individuals, that persons normally don't want to be with someone who is victimizing them." The trial court appropriately held that the normally expected, observable manifestations of father-daughter relationships when there has been sexual abuse are not within the common knowledge of lay persons or jurors. The only witness to testify on the subject, psychologist Beth Young-Verkuilen, testified that a victim will have ambivalent feelings about the relationship with a close relative following sexual abuse and sometimes the relationship is strengthened. The trial court could reasonably conclude that commonly held misconceptions about the relationship between a father and daughter after sexual abuse require expert testimony before lay evidence of a "normal" relationship could be considered relevant.

¶7 The prosecutor's closing argument constituted a reasonable comment on Charles' credibility. The prosecutor referred to Charles as an alcoholic and a liar, and he argued that adverse inferences should be drawn by Charles' violation of the sequestration order. A prosecutor is permitted to comment on the credibility of witnesses if the comment is based on the evidence presented. *See* ***State v. Adams***, 88 Wis. 2d 1, 18, 584 N.W.2d 695 (Ct. App. 1998). Charles' alcohol abuse is relevant because his daughter testified that she could smell alcohol during the incidents and a police officer testified that Charles told him the assaults could have occurred "maybe if he was totally blacked out." The officer also testified that he smelled the odor of alcohol on Charles during the interview, but Charles told him that he had been in an alcohol treatment program for twenty-eight days. The prosecutor reasonably encouraged the jury to infer that

Charles assaulted his daughter while intoxicated and that he lied to the police during the investigation. The lie and the violation of the sequestration order reflect on Charles' credibility because they are acts intended to obstruct justice. They are admissible to show consciousness of guilt. *See* ***State v. Bauer***, 2000 WI App 206, ¶6, 238 Wis. 2d 687, 617 N.W.2d 902. The prosecutor's unflattering characterizations of Charles provide no basis for reversal because they are supported by a reasonable view of the evidence. *See* ***State v Johnson***, 153 Wis. 2d 121, 132 n.10, 449 N.W.2d 845 (1990).

¶8 Charles' fifteen-year sentence, consecutive to the twelve-year sentence imposed by the Milwaukee County court, is not excessively harsh and does not violate double jeopardy. The trial court appropriately considered the seriousness of the offense, the need to protect Charles' daughter, the fact that Charles was on probation at the time this offense occurred and the pattern of his behavior. *See* ***State v. Tew***, 54 Wis. 2d 361, 367-68, 195 N.W.2d 615 (1972). The sentence is not so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A sentencing court does not violate the double jeopardy clause by sentencing a defendant after his crime has been taken into consideration in sentencing on a prior unrelated conviction. *See* ***Witte v. State***, 115 U.S. 389, 398 (1995).

¶9 Charles alleges ineffective assistance of trial counsel in numerous respects. To establish ineffective assistance, he must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, he must show a reasonable probability that the deficient performance adversely affected his defense such that it undermines our confidence in the outcome. ***Id.*** at 694.

¶10 Several of Charles' ineffective assistance claims, particularly excluding Aslin's testimony and objecting to the prosecutor's closing argument, fault his attorney for failing to preserve issues for appeal. Because we have reviewed those issues on the merits, Charles was not prejudiced by any deficiency in his counsel's efforts to preserve those issues. In addition, our conclusion that violation of the sequestration order constituted proof of consciousness of guilt also defeats any claim that Charles' trial counsel was ineffective by not preventing disclosure of his misconduct to the jury. The law provides no basis for excluding this relevant testimony.

¶11 Several of Charles' ineffective assistance arguments fail because counsel's decisions constitute a reasonable trial strategy. Counsel's strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. ***Strickland***, 466 U.S. at 690. At the postconviction hearing, Charles' trial counsel offered a reasonable explanation for his strategic choices on several issues. First, he chose to introduce Charles' use of alcohol. The jury had already heard opening statements and evidence that suggested an alcohol abuse component to this offense. Counsel reasonably chose to have Charles acknowledge the problem and take credit for subsequent treatment. Counsel testified that Charles insisted that the evidence of his treatment be presented to the jury. The reasonableness of counsel's actions may be determined or substantially influenced by Charles' own statements and actions. ***Id.*** at 691. Charles faults his attorney for not requesting a jury instruction limiting its considerations of his alcohol abuse. Counsel reasonably believed it would be preferable for a jury to view Charles' alcohol treatment as a positive and not associate it with other bad acts.

¶12 Next, Charles faults his trial counsel for failing to conduct a proper voir dire of a prospective juror who stated that her teenage daughter had been molested. Counsel testified that he saw nothing in the juror's demeanor that indicated she could not be impartial. Counsel also testified that Charles expressed an opinion that, because the juror had a teenage daughter, she "might know that teenagers could lie." Counsel "acquiesced" in Charles' wishes. Charles cannot fault his attorney for acquiescing in Charles' expressed choice. ***Id.***

¶13 Charles raised several challenges to his trial counsel's decisions regarding expert witnesses. The trial court initially prohibited the State from presenting ***Jensen*** evidence[1] because the victim refused to submit to an examination. After the defense cross-examined the victim about her delay in reporting the assaults and returning to Charles' home after the assaults, the trial court concluded that the defense had opened the door to allowing limited expert testimony to disabuse the jury of any impression that delayed reporting and voluntarily returning to the home were unusual. Two experts testified that delayed reporting was common and, if the perpetrator is a close relative, the victim often has ambivalent feelings and sometimes their relationship with the abuser strengthens.

¶14 Charles argues that his trial counsel was ineffective for not claiming surprise at the State's ability to present this evidence and that counsel should have objected because he had not been provided with a summary of the expert opinion. Trial counsel testified at the postconviction hearing that he was not surprised. Therefore, that aspect of the argument is not supported by the facts. The argument

[1] ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988).

that counsel was not provided with a summary of the experts' opinion was not developed at the postconviction hearing or on appeal.

¶15 Charles also faults his trial counsel for failing to request a psychological examination of the victim once the trial court allowed the State's expert witnesses to testify. The State's expert witnesses' testimony did not depend upon an examination of or familiarity with the victim. They testified in the abstract about incest victims' delayed reporting and returning to the perpetrator's home. These facts were matters of record known to the defense. Psychological examination of the victim was not necessary to challenge or contradict the State's evidence. *See* ***State v. Rizzo***, 2002 WI 20, ¶31-32, 250 Wis. 2d 407, 640 N.W.2d 93. Charles' trial counsel reasonably concluded that the court would not postpone completion of the trial to allow a psychological examination based only on the limited testimony the State's experts were allowed to present.

¶16 Charles next faults his trial counsel for failing to call any witness to rebut the State's expert witnesses' testimony regarding delayed reporting and voluntarily returning to Charles' home. The defense did not establish at the postconviction hearing that any expert would rebut that testimony. The defense expert, Dr. Phillip Esplin, apparently opined[2] that there is no identifiable pattern of child behaviors that could be used as proof that sexual abuse had occurred. That testimony is entirely consistent with the State's experts' opinions that delayed reporting and returning to the family should not be viewed as evidence that the

[2] Dr. Esplin's testimony and report are not included in the record on appeal, although aspects of his opinion can be gleaned from the parties' arguments in the circuit court.

assault did not take place. Charles has not established that he was prejudiced by his counsel's failure to present comparable testimony at trial.

¶17 Finally, Charles faults his attorney for not calling two witnesses to impeach the victim's testimony regarding her recollection of the Milwaukee incident. Counsel testified at the postconviction hearing that he believed calling these witnesses would put undue emphasis on the Milwaukee conviction without any significant gain. The witnesses' testimony was evidently not believed by the Milwaukee jury. It is also doubtful that the trial court would have allowed a mini-trial on the Milwaukee incident under the guise of challenging the victim's credibility on the Outagamie County incident. Counsel's decision not to attempt to retry the Milwaukee case constitutes a reasonable trial strategy.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).