COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3402-CR **Cir. Ct. No. 02CF000076**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW S. CARLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Matthew S. Carlson appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the trial court erred when it denied his motion for substitution of counsel before trial, and that he received ineffective assistance of trial counsel. Because we conclude that the trial court did not err and

that Carlson has not established that he received ineffective assistance of counsel, we affirm the judgment and order of the circuit court.

¶2 Carlson was convicted of five counts of sexual assault of a child as a repeat offender. The court sentenced him to fifty-five years in prison. The trial in the case was scheduled for August 27, 2002. On August 6, defense counsel moved to adjourn the trial to allow further investigation of a possible defense. The court denied the motion at a hearing held on August 12. At a hearing on August 14, defense counsel once again asked for an adjournment and the court denied it noting the age of the victim and that its calendar would not allow for a short adjournment. The court also informed the parties that it would be unavailable the week prior to trial. On August 19, during the week the court was unavailable, defense counsel moved to withdraw and to allow new counsel to be substituted.

¶3 The court heard the motion when it returned on August 26, the day before the trial was scheduled to begin. At the hearing, Carlson's counsel, Attorney Kaiser, asked that he be allowed to withdraw and that the court allow Attorney Shellow to represent Carlson. The State opposed the motion. The court considered the arguments made at the hearing and in the motion papers. The court asked Attorney Shellow if she was prepared to go to trial the next day and she said no. The court denied the motion, stating that the trial date had been set since May, the trial was scheduled to start the next day and would not be able to be rescheduled for many months, defense counsel had two motions for adjournment denied by the court the previous week, the victim was young, and that there was nothing in the motion papers that established a break down of communication between client and counsel of a magnitude that required the adjournment.

¶4 At the start of trial the next day, Carlson again asked the court to allow Attorney Shellow to represent him. The court listened to Carlson's argument and once again denied the motion. The court stated that this was not a situation in which the relationship had broken down to the point of no communication, but rather involved a differing view of the appropriate trial strategy. The court also noted once again that defense counsel had moved to adjourn the case twice just two weeks previously. The court stated that its calendar would not allow the case to be rescheduled anytime soon, that the victim was young, and that the trial date had been set for ninety days. The court further found that Attorney Kaiser would be able to represent Carlson in a competent manner.

¶5 "The Sixth Amendment guarantee of assistance of counsel includes a qualified right to representation by counsel of the accused's choice." ***State v. Wanta***, 224 Wis. 2d 679, 702, 592 N.W.2d 645 (Ct. App. 1999) (citation omitted). When deciding whether to allow a request for substitution and the associated request for a continuance, the circuit court must balance the defendant's qualified right to counsel of choice with the societal interest in the prompt and efficient administration of justice. ***Id.*** at 703. The circuit court should consider: "the length of delay requested; whether there is competent counsel presently available to try the case; whether other continuances have been requested and received by the defendant; the convenience or inconvenience to the parties, witnesses and the court; whether the delay seems to be for legitimate reasons or whether its purpose is dilatory." ***Id.*** at 703-04 (citation omitted). The court may also consider other relevant factors. ***State v. Lomax***, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). The circuit court is required to conduct a meaningful inquiry, but the hearing on the matter may not take more than minutes. ***Id.*** at 362.

¶6 The determination of whether counsel should be able to terminate the attorney/client relationship is addressed to the trial court's discretion. *See* ***State v. Cummings***, 199 Wis. 2d 721, 749, 546 N.W.2d 406 (1996). Similarly, the determination of whether a factual basis exists to allow new counsel to proceed is within the trial court's discretion. ***State v. Kazee***, 146 Wis. 2d 366, 371, 432 N.W.2d 93 (1988); ***Wanta***, 224 Wis. 2d at 689. When determining whether the circuit court properly denied motions for withdrawal and substitution of counsel, we consider: "(1) the adequacy of the court's inquiry into a defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between a defendant and his attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." ***Wanta***, 224 Wis. 2d at 702-03 (citation omitted).

¶7 In this case, we conclude that the circuit court properly exercised its discretion when it denied Carlson's motion for substitution. At both the hearing the day before trial as well as at the start of trial, the court considered the arguments made to it as well as those made in the documents submitted, and concluded that the relationship between counsel and client had not broken down to the extent that they were not communicating. The court further considered that requests for adjournment had been made and denied just two weeks before. The court noted that the trial date had been set for ninety days and the request came the day before trial. The court asked substitute counsel if she was prepared to go to trial on the date set and she said no. The court stated that its calendar would not allow for the trial to be rescheduled for many months and that the victim involved was young. The court also stated that there had been many appearances in court and it believed that Carlson's original counsel would be able to provide adequate representation. We conclude that the circuit court made an adequate inquiry into

Carlson's reasons for the request. Further, the motion was made on the eve of trial when the court's calendar would not allow for a short adjournment, and only shortly after the trial court had denied two defense requests for an adjournment. We also are not convinced that the trial court erred when it concluded that the asserted conflict between counsel and Carlson was not so great that it resulted in a total lack of communication. Consequently, we conclude that the trial court properly denied Carlson's request for substitution of counsel.

¶8 Carlson next argues that he received ineffective assistance of trial counsel. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** at 697. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. Consequently, if counsel's performance was not prejudicial, the claim fails and this court need not examine the performance prong. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' 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) (citations omitted).

¶9 Carlson first claims that his counsel was ineffective because he did not cross-examine the victim about a statement the victim made to his grandfather

denying that the assaults occurred. The record establishes that counsel did ask the question of the victim and the State objected. During an argument outside the presence of the jury, the court indicated it would allow the question. The State then said it would ask the victim why he had denied the allegations and that he would testify that Carlson had threatened him. Defense counsel then withdrew the question.

¶10 After trial, Carlson moved for postconviction relief asserting that he had received ineffective assistance of trial counsel. At the ***Machner***[1] hearing, counsel testified that he had withdrawn the question as a strategic decision to keep the jury from hearing about a prior sexual assault charge against Carlson. We agree with the circuit court's conclusion that this was a reasonable strategic decision and did not constitute ineffective assistance of counsel. Similarly, we reject Carlson's claim that counsel was ineffective for not hiring an expert to testify about the proper interrogation techniques of minor victims. Again counsel testified that the decision not to call an expert was a strategic decision. The putative expert's testimony would have diverted the attention of the jury from the theory of the defense, which was that the victim was lying, and would have led to a battle of the experts. We again agree with the trial court that this was a reasonable strategic decision and did not constitute ineffective assistance of counsel. Because we conclude that Carlson has not established that his trial counsel's performance was deficient, we need not address the prejudice prong.

¶11 Finally, Carlson argues that the evidence was insufficient to sustain his conviction. When considering a challenge to the sufficiency of the evidence,

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

this court must affirm "if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt.... [T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). If more than one inference can be drawn, the inference which supports the jury's verdict must be followed unless the evidence was incredible as a matter of law. ***Id.*** at 377. "[I]f any possibility exists that the jury *could* have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we will not overturn a verdict even if we believe that a jury *should* not have found guilt based on the evidence before it." ***Id.*** The credibility of witnesses and the weight to be accorded to their testimony are among the matters appropriately left to the jury's judgment, and where more than one inference is possible, the inference drawn by the jury must be accepted. ***Roach v. Keane***, 73 Wis. 2d 524, 536, 243 N.W.2d 508 (1976).

¶12 We conclude that this case involved a classic credibility battle between the victim and the defendant. The jury here chose to believe the victim. We see no basis for overturning this decision. Consequently, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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