COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3152-CR **Cir. Ct. No. 2008CF391**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL A. SCHILLINGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., and JAMES M. MASON, Judges. *Affirmed.*

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

¶1 PER CURIAM. Daniel Schillinger was tried before a jury and convicted of one count of first-degree sexual assault of a child under age 13. Trial evidence showed that Schillinger had sexual contact with his daughter, S.M.S. On

appeal, Schillinger argues that his trial counsel provided ineffective assistance when counsel failed to object to a police detective's testimony that "[i]t's more common that [persons accused of sexual assault] deny sexual assault." He also complains that the circuit court erroneously responded to a jury question. We reject both arguments, and affirm the circuit court.[1]

Background

¶2 Daniel Schillinger was tried on one count of first-degree sexual assault of a child under the age of 13 for incidents occurring on or about August 18, 2007, involving his then-eight-year-old daughter, S.M.S. Due to pretrial stipulations, the dispute at trial was whether sexual contact occurred. Three witnesses testified: the victim, S.M.S.; Mary Pavelec, Schillinger's girlfriend at the time of the assaults; and Tad Wetterau, the police detective who interviewed Schillinger.

¶3 S.M.S. told the jury that, on the night of the incident, she, her father, Mary Pavelec, her brother, and her grandfather were at her grandfather's house. They had eaten Kentucky Fried Chicken and were in the basement of the house watching television. S.M.S. testified that they were all going to stay overnight, and described the layout of the basement and where everybody was going to sleep. S.M.S. said that Mary went home, though, because "[Mary] was upset," but S.M.S. did not know why. After Mary left, S.M.S. testified that her grandfather was upstairs in his bedroom and her brother was asleep in the basement. S.M.S.

[1] The Honorable Edward F. Zappen, Jr., presided over the trial and entered the judgment of conviction, and the Honorable James M. Mason entered the order denying postconviction relief.

testified that she tried to go to sleep, but Schillinger "told [her] to go up on the bed and do privates." S.M.S. told him no, but he still made her come up on the bed and, when she got there, he "rub[bed] his hand in my pants on to my underwear." She said that, while he was doing this, there was a "naughty show on" television, and Schillinger made her "close [her] eyes and plug [her] ears." S.M.S. said he was rubbing "[u]p and down," and that she told him to stop but he would not. She testified that "privates" meant where she went "[t]o the bathroom," and that he touched her where she went "[p]ee." She further testified that this was the only place Schillinger touched her and that eventually he stopped, at which time he went to sleep.

¶4 Mary Pavelec testified that she and Schillinger had been in a relationship for about six months at the time this incident occurred. She said every time she tried to get close to Schillinger's children, Schillinger would get mad. On the weekend of August 17, they went to pick the children up from the children's mother, and S.M.S. did not want to come with them. The mother and Schillinger were talking about that and Mary was with the children. Mary testified that, at that time, S.M.S. told her that "something that [S.M.S.] felt was inappropriate ... was occurring between [S.M.S.] and her dad." Mary was very upset by this and tried to talk to Schillinger about it, but he would not talk to her then. Mary's testimony from this point on corroborated S.M.S.'s testimony with respect to eating Kentucky Fried Chicken, their weekend plans, and the sleeping arrangements at the grandfather's house. Mary further testified that she tried to talk to Schillinger at the grandfather's house about what S.M.S. had told her, but that Schillinger would not discuss it, which upset Mary and she went home. She testified that, when she left the grandfather's house, which was sometime between

10:00 and 10:30 p.m., Schillinger had told his son to go to bed, but that he would not let S.M.S. go to bed, and that S.M.S. was still up when Mary left.

¶5 Detective Tad Wetterau testified that he interviewed Schillinger. Wetterau said Schillinger admitted that, on the evening of August 17, he and S.M.S. were the only two still awake in the basement at some point. Schillinger was not sure what time that was, but it was sometime after Mary had left. Wetterau said Schillinger told him that S.M.S. was watching television and that he was "in somewhat of a daze and talking with her." Wetterau testified that Schillinger "flatly denied" that he ever inappropriately touched S.M.S.

¶6 The jury found Schillinger guilty. Schillinger appealed.

Discussion

¶7 Schillinger first argues that his trial counsel provided ineffective assistance when counsel failed to object to ***Haseltine*** evidence.[2] Briefly stated, ***Haseltine*** evidence is testimony from one witness that another witness is telling the truth. Schillinger points to an answer Detective Wetterau gave after Schillinger's counsel elicited from the detective that Schillinger had denied inappropriately touching S.M.S. On redirect, the following exchange took place:

> [Prosecutor]: You indicated you [have] been a detective for how many years?
>
> [Detective Wetterau]: Been with the Wisconsin Rapids Police Department for 29 years, 19 of those as an investigator, detective.

[2] ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

[Prosecutor]:	And you said [one] of the areas that you specialize in is child sexual assault cases?
[Detective Wetterau]:	That is correct.
[Prosecutor]:	Okay. Is it common in your experience in these investigations that defendants, when confronted with information of whether someone [has] accused them, that they readily admit to you that they had sexually assaulted the children?
[Detective Wetterau]:	It's more common that they deny sexual assault.

¶8 We will assume, without deciding, that the last question and answer had the effect of putting inadmissible ***Haseltine*** evidence before the jury. We will further assume, without deciding, that Schillinger's trial counsel performed deficiently when counsel failed to object. Nonetheless, reversal is not warranted because Schillinger has not demonstrated prejudice.

¶9 Ineffective-assistance-of-counsel claims are analyzed using the two-part test described in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove that his or her counsel's performance was deficient and that the deficiency prejudiced his or her defense. In this analysis, courts may decide ineffective assistance claims based on prejudice without considering whether the counsel's performance was deficient." ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111 (citations omitted). "To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's error(s), the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome." ***Id.***, ¶29.

¶10 Here, there is no prejudice because Detective Wetterau's testimony has little or no probative value. The jury was told the unsurprising fact that, in the officer's personal experience, people suspected of sexually assaulting children "more common[ly]" deny the allegation than admit it when confronted by a police officer. Notably, the testimony does not indicate how many of the suspects actually committed the assaults. And, presumably, at least a portion of the deniers are telling the truth. Thus, the detective's testimony does not indicate in any meaningful manner whether a suspect's denial makes it more likely that the accuser is telling the truth. And, it is readily apparent that the detective is not commenting on the truthfulness of the particular victim in this case. It follows that there is no reasonable probability that the detective's testimony affected the outcome of the trial.[3]

¶11 Schillinger next argues that the circuit court erred when it answered a jury question by telling the jury that the identity of the person who initiated the charges "is of no consequence to guilt or innocence." Schillinger argues that this answer was "dead wrong" because it is obvious that knowing the identity of the person who initiated the charges might cast light on who was "involved in shaping [S.M.S.'s] story to its present form." Schillinger contends that the lack of evidence as to who initiated the charges has probative value. This argument is meritless.[4]

[3] Schillinger also argues that the detective's testimony was not admissible under ***State v. Richard A.P.***, 223 Wis. 2d 777, 795, 589 N.W.2d 674 (Ct. App. 1998), a case addressing certain types of profile evidence. We agree that the evidence here was plainly not admissible under ***Richard A.P.*** or its progeny. Those cases deal with a very different topic.

[4] The parties dispute whether Schillinger's challenge to the circuit court's answer to the jury's question has been forfeited. We need not decide that issue because we conclude that the circuit court did not err.

¶12 During jury deliberations, the jury sent a question to the court asking: "[W]ho initiated the charges in this case?" It is undisputed that there was no trial evidence on this topic—nothing indicating how the allegations came to the attention of the authorities or who, if anyone, pressed authorities to charge Schillinger. After consulting with the parties, the circuit court answered the jury's question as follows: "It is of no consequence to guilt or innocence. Please disregard the issue."

¶13 In light of the absence of trial evidence on the topic, the circuit court's response to the question was proper. There was no evidence from which the jury could have made an inference about S.M.S.'s credibility based on who initiated the charges. The fact that in *other* cases, where there *is* evidence on this topic, the answer to such a question could be of consequence to guilt or innocence does not help Schillinger here. His argument—that a lack of evidence on this topic is probative—has no basis in logic or common sense.

By the Court.—Judgment and order affirmed.

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