COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2919-CR **Cir. Ct. No. 2006CF682**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS S. BENJAMIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Marcus S. Benjamin has appealed from a judgment convicting him of one count of first-degree sexual assault of a child and one count of incest with a child, both convictions as a repeat offender. He has also appealed from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 The issue on appeal is whether the trial court erred in denying Benjamin's motion for a new trial based on ineffective assistance of trial counsel. Benjamin contends that his trial counsel rendered ineffective assistance when he failed to object to the admission of the portion of Benjamin's written statement to a detective in which he stated that he recently got out of prison after seven years, two months, and three days; failed to object to the jury's viewing of the videotaped interview of the victim for a second time; and failed to object to a portion of the prosecutor's closing argument. We agree with the trial court that trial counsel's representation did not constitute ineffective assistance.

¶3 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***State v. Thiel***¸ 2003 WI 111, ¶¶18-19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶20 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on "the reliability of the proceedings." ***Id.***, ¶20 (quoting ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)).

¶4 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the trial court's findings of fact, including its findings regarding counsel's conduct and strategy, unless they are clearly erroneous. ***Id.*** However, the ultimate determination of whether

counsel's performance satisfies the constitutional standard for ineffective assistance of counsel presents a question of law. ***Thiel***, 264 Wis. 2d 571, ¶21. This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. ***Id.***, ¶24.

¶5 Review of trial counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson,*** 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** The appropriate measure of attorney performance is reasonableness, considering all the circumstances. ***State v. Brooks***, 124 Wis. 2d 349, 352, 369 N.W.2d 183 (Ct. App. 1985).

¶6 The trial court denied Benjamin's claim that his trial counsel rendered ineffective assistance by failing to object to the jury's second viewing of the videotaped interview of the victim, A.B., without holding an evidentiary hearing on that issue.[1] It denied Benjamin's remaining claims of ineffective assistance after holding an evidentiary hearing at which Benjamin's trial counsel testified, as provided in ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905

[1] A defendant is entitled to an evidentiary hearing on a postconviction motion alleging ineffective assistance of counsel only if his motion alleges facts which, if true, would entitle him to relief. ***State v. Howell***, 2007 WI 75, ¶¶74-75, 301 Wis. 2d 350, 734 N.W.2d 48. The motion may be denied without a hearing if it fails to allege facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record otherwise conclusively demonstrates that he is not entitled to relief. ***Id.***, ¶75.

(Ct. App. 1979). The trial court determined that trial counsel's representation was neither deficient nor prejudicial. We agree.

¶7 At trial, Detective Warren DenHartog testified that Benjamin made oral and written statements to him. DenHartog read the written statement given to him by Benjamin two days after the alleged assault. In the statement, Benjamin detailed his activities on the day of the alleged assault, effectively denying that any sexual assault occurred. In the first paragraph of the statement, Benjamin stated that he was living with his mother and sister, and that "[he] recently got out of prison after 7 years, 2 months and 3 days."

¶8 Benjamin contends that because trial counsel failed to object to the admission of the portion of the statement discussing his recent prison sentence, negative character evidence arousing the jury's sympathies and sense of horror and provoking it to punish Benjamin was admitted at trial. Benjamin contends that the evidence was prejudicial because it unfairly swayed the jury and diminished his credibility, which was of particular importance because this was a "he said/she said" case that required the jury to determine the respective credibility of Benjamin and A.B.

¶9 At the ***Machner*** hearing, trial counsel testified that he did not object to the portion of the written statement referring to Benjamin's prior prison sentence because, in preparing for trial, he discussed the matter with Benjamin and it was Benjamin's position that the reference to his prior imprisonment supported his defense more than it hurt it. Trial counsel testified that Benjamin's position was that he wanted to see his loved ones after being away from them for more than seven years and was not going to do anything to jeopardize those relationships, making it unlikely that he committed the alleged sexual assault. Trial counsel's

testimony indicated that he understood both Benjamin's position and the other side of the issue. Counsel testified that it was a question of weighing the positions and that, as part of his trial strategy, he elected to allow the statement into evidence consistent with Benjamin's position.

¶10 Benjamin also testified at the ***Machner*** hearing, stating that he could not recall discussing this issue with trial counsel. While acknowledging Benjamin's testimony, the trial court found that trial counsel's decision not to object to the statement regarding Benjamin's prior imprisonment was a strategic decision made by counsel after consultation. The trial court thus implicitly found trial counsel's testimony that he consulted with Benjamin on the issue to be credible. Because credibility determinations are for the trial court and the trial court's finding is not clearly erroneous, it will not be disturbed by this court. *See* ***State v. Pote***, 2003 WI App 31, ¶17, 260 Wis. 2d 426, 659 N.W.2d 82.

¶11 This court will not second-guess a trial attorney's considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. ***Id.*** at 464-65. Moreover, the reasonableness of trial counsel's actions may be substantially influenced by the defendant's statements and conduct. ***Strickland***, 466 U.S. at 691; ***Pitsch***, 124 Wis. 2d at 637.

¶12 We agree with the trial court that trial counsel's decision not to object to the statement regarding Benjamin's recent imprisonment was a deliberate and reasonable trial strategy, and thus did not constitute deficient performance. We recognize that, as contended by Benjamin on appeal, trial counsel did not

argue to the jury that Benjamin was unlikely to commit a new crime after being so recently incarcerated, or that he had a strong incentive to behave because of his recent incarceration. However, as noted by the trial court, even without an argument by trial counsel specifically addressing the matter, a jury could infer that a person who had just gotten out of prison and was counting the days until his release would not have put himself at risk of being re-incarcerated by committing a new crime, particularly one where he would be so easily identified. Trial counsel's choice of this strategy therefore was rationally based on the facts and law. Because trial counsel's decision to forgo objecting to the portion of the statement referring to Benjamin's prior imprisonment was consistent with Benjamin's position that the evidence should be admitted and was a deliberate and reasonable trial strategy, it did not constitute deficient performance.

¶13 Because we conclude that Benjamin has not shown that trial counsel's performance was deficient, we need not address whether admission of the evidence was prejudicial. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. Nevertheless, we address the prejudice prong of the ineffective assistance test, and conclude that trial counsel's failure to object to the portion of the statement regarding Benjamin's prior imprisonment was not prejudicial. Benjamin's contention that the information negatively impacted his credibility with the jury is speculative, since the evidence may also have assisted his defense in the manner asserted by him prior to trial.[2] Most importantly, even though Benjamin denied sexually assaulting A.B. in his statements to the police,

[2] Although Benjamin did not testify at trial, his credibility was at issue because statements made by him, including his written and oral statements to Detective DenHartog denying the sexual assault, were admitted at trial.

his oral statements can be deemed inculpatory. DenHartog testified that Benjamin denied sexual contact and told him that A.B. would lie, but also said that the Kenosha police department would have to prove this, and there was no semen. DenHartog testified that he then asked Benjamin whether he used a condom or wiped it off, and Benjamin replied: "No semen, no proof." As argued by the prosecutor in closing argument, the statement, "[n]o semen, no proof," could be construed as implicitly admitting guilt, particularly when combined with six-year-old A.B.'s testimony that Benjamin had all his clothes off, put a "balloon on his private," and washed her off after the assault.[3]

¶14 Based upon the record, we agree with Benjamin that the jury was required to weigh the credibility of his statements and A.B.'s testimony and interview statements, and that there were some weaknesses in the State's case. However, considering the evidence in its entirety, our confidence in the outcome and reliability of the trial is not undermined by the admission of the information that Benjamin was previously imprisoned for seven years.

¶15 Benjamin's next argument is that his trial counsel rendered ineffective assistance when he failed to object to the jury's request to view the videotaped interview of the victim for a second time. The interview of A.B. took place at the Child Advocacy Center (CAC) three days after the alleged assault, and was played in evidence at trial. During its deliberations, the jury asked to view the interview a second time. The trial court granted the request with the consent of

[3] A sexual assault nurse examiner who performed a pelvic examination of A.B. on the day the assault was reported additionally testified that abrasions, seeping, redness, and swelling were observed by her and were consistent with a recent sexual assault, although she also acknowledged that these findings could result from poor hygiene or chemical irritation.

both counsel. Citing ***State v. Hines***, 173 Wis. 2d 850, 862, 496 N.W.2d 720 (Ct. App. 1993), Benjamin contends that permitting the jury to view the videotaped interview for a second time was inequitable because it allowed the jury to place more emphasis on evidence favorable to the State, while requiring the jurors to rely on their recollection of other evidence. In conjunction with this argument, he also contends that trial counsel rendered ineffective assistance by failing to object to the jury's request to view Benjamin's written statement during deliberations, and by stipulating to the admission of the report of Julie McGuire, the social worker who interviewed A.B. at the CAC, so that the jurors could view the CAC report during deliberations, as requested by them.[4]

¶16 Whether an exhibit should be sent to the jury room during deliberations is a discretionary decision for the trial court. ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. Factors to consider include whether the exhibit will aid the jury in the proper consideration of the case, whether a party will be unduly prejudiced by submission of the exhibit, and whether the exhibit could be subjected to improper use by the jury. ***Id.***

¶17 The trial court did not erroneously exercise its discretion in allowing the jury to see the videotaped interview of A.B. a second time. The trial court could reasonably conclude that allowing the jurors to view the interview a second time would assist the jury in evaluating the veracity of A.B.'s statements, potentially assisting Benjamin's defense rather than harming it. In addition, the videotape was re-played in open court, in the presence of the trial court judge,

[4] During her testimony, McGuire had been questioned about only one section of her report.

counsel, and Benjamin. The trial court thus complied with the procedure set forth in ***Anderson*** and prevented the misuse of the videotape or overemphasis of the interview relative to the other evidence at trial. *See* ***id.***, ¶¶30-32. Because the trial court acted within the scope of its discretion in re-playing the videotaped interview during the jury's deliberations, trial counsel did not render ineffective assistance by failing to object. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (It is not ineffective assistance to fail to bring a motion or raise an objection that would have lacked merit).

¶18 Benjamin's contention that his trial counsel rendered ineffective assistance by failing to object to the jury's request to see his written statement during deliberations fails for similar reasons. As noted by the trial court and counsel, the written statement had already been read verbatim to the jury. Because the jury was already aware that Benjamin had recently been in prison, no basis exists to conclude that the jurors could misuse the exhibit or that permitting the statement to go to the jury would cause undue prejudice to Benjamin, particularly since the statement also set forth Benjamin's position that he had engaged in no misconduct. Trial counsel therefore did not render ineffective assistance by failing to object when the jurors asked to see the statement during deliberations.

¶19 For the same reasons, we reject Benjamin's contention that he is entitled to a new trial because his trial counsel stipulated that the CAC report could be admitted into evidence and provided to the jury during deliberations. Trial counsel's cross-examination of McGuire established that the report contained some statements that could be deemed beneficial to Benjamin. Moreover, nothing in Benjamin's argument in the trial court or this court indicates that the CAC

report contained any information that had not already been presented in evidence.[5] As with Benjamin's written statement, no basis therefore exists to conclude that the report could be improperly used or was unduly prejudicial to him.

¶20 Benjamin's final argument is that his trial counsel rendered ineffective assistance by failing to object to the portion of the prosecutor's closing argument that stated:

> What he did to his daughter, he took away the moment for her that she was supposed to choose when it happened. She was supposed to choose who it was with. And she was—it was supposed to be special for her. And he took that away because no matter what she does in the future, she will never forget. She will never, ever forget what her dad did to her on Father's Day.

¶21 An attorney is allowed latitude in his or her closing argument, and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments. ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). A prosecutor may comment on the evidence, detail the evidence, and argue from it to a conclusion. ***Embry v. State***¸ 46 Wis. 2d 151, 160, 174 N.W.2d 521 (1970). The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury arrive at a verdict by considering factors other than the evidence. ***Neuser***, 191 Wis. 2d at 136.

[5] Benjamin objects that the CAC report referred to his incarceration and supervised visitation. The report was admitted as Exhibit 14 at trial and is in the record on appeal. It has the words "MEDICAL RECORDS" stamped on it, virtually obliterating the reference to visits between Benjamin and A.B. In any event, supervised visitation had been referred to at trial when, over trial counsel's objection, the police officer who responded to the sexual assault complaint testified that A.B.'s mother was mad at herself for allowing A.B. to go with Benjamin even though he had only supervised visits in the past.

¶22 Benjamin contends that the prosecutor's argument was designed to inflame the jury's passions about A.B.'s loss of virginity and to improperly influence the jurors to provide retribution and compensate A.B. for the injury done to her. At the ***Machner*** hearing, trial counsel testified that he did not object to the closing argument because he believed it was a permissible argument. The trial court agreed, concluding that trial counsel's failure to object was neither deficient nor prejudicial.

¶23 We agree with the trial court's determinations. In concluding that the argument was proper, we note that the prosecutor never directly referred to A.B.'s virginity.[6] While the argument may have appealed to the jurors' emotions, it did not cross the line by suggesting to the jurors that they should decide Benjamin's guilt or innocence based on anything other than the evidence. Trial counsel therefore did not perform deficiently by failing to object to the argument. We further note that the jurors were instructed that they were required to decide the case solely on the evidence, and must not be swayed by sympathy, prejudice, or passion. Under these circumstances, confidence in the outcome of the trial is not undermined by trial counsel's failure to object to the argument. Benjamin's postconviction motion therefore was properly denied.

[6] Benjamin's reliance on ***State v. Gavigan***, 111 Wis. 2d 150, 158-59, 330 N.W.2d 571 (1983) and ***State v. Clark***, 87 Wis. 2d 804, 817, 275 N.W.2d 715 (1979), addressing the admissibility of evidence concerning a victim's virginity or lack of a sexual history, is misplaced. The prosecutor presented no evidence on this topic, and therefore did not violate the prohibitions discussed in those cases.

By the Court.—Judgment and order affirmed.

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

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