COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP3136 **Cir. Ct. No. 2006CF15**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE H. SERGENT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

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

¶1 PER CURIAM. George Sergent appeals an order that denied his postconviction motion for relief from a judgment convicting him of one count of attempted second-degree sexual assault of an unconscious person and one count of attempted third-degree sexual assault. He claims that he should have been granted

an evidentiary hearing on his claims that trial counsel and/or postconviction counsel provided ineffective assistance by: (1) failing to challenge the sufficiency of the evidence on the element of intent; (2) failing to further question or move to strike a juror who expressed ambivalence about her ability to be impartial; (3) failing to challenge an amendment to the information that was made while Sergent was without counsel; (4) failing to raise a multiplicity challenge to the two sexual assault counts; (5) failing to adequately challenge the credibility of the State's witnesses in multiple respects; and (6) failing to provide Sergent with accurate information about the admissibility of his own prior convictions, which he asserts affected his decision not to take the stand. We reject Sergent's arguments, and affirm for the reasons discussed below.

BACKGROUND

¶2 The charges in this case were based on allegations made by a woman that she returned to Sergent's house after a night of drinking at bars with her husband and Sergent. The victim was intoxicated and went straight to bed still wearing her clothes. She awoke to find Sergent in the process of pulling off her pants. Sergent was still wearing his own clothes. The victim kicked and swore at Sergent, and he slapped and punched her and finished removing her pants. The victim was eventually able to get away and scrambled out of the bedroom wearing only a shirt. We will set forth additional facts as necessary in our discussion of each of the issues on appeal.

STANDARD OF REVIEW

¶3 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. Since Sergent

has framed all of his claims within the context of ineffective assistance of counsel,[1] that means his postconviction motion must have alleged facts that, if true, would establish both that counsel performed deficiently—that is, outside of professional norms—and that the deficient performance prejudiced Sergent, rendering the resulting conviction unreliable. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. We review the sufficiency of a postconviction motion *de novo*, based on the four corners of the motion. ***Allen***, 274 Wis. 2d 568, ¶¶9, 27.

DISCUSSION

Sufficiency of the Evidence

¶4 Sergent first argues that postconviction counsel should have challenged the sufficiency of the evidence because no jury, acting reasonably, could have found beyond a reasonable doubt that he had attempted an act of genital or anal intrusion based on the victim's testimony that when she went to bed she was fully clothed, and when she awoke Sergent was removing her pants.

¶5 Attempted second- and third-degree sexual assault by sexual intercourse each require evidence that a defendant attempted vulvar penetration or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening of another. *See* ***State v. Wulff***, 207 Wis. 2d 143, 145, 557 N.W.2d 813 (1997); *see also* WIS. STAT. §§ 940.225(2)(d), 940.225(3),

[1] We note that, under ***State v. Miller***, 2009 WI App 111, ¶¶25-30, 320 Wis. 2d 724, 772 N.W.2d 188, a defendant may now directly challenge the sufficiency of the evidence in a WIS. STAT. § 974.06 motion. We need not decide whether to construe Sergent's claims here as direct challenges rather than ineffective assistance claims, however, because it would make no difference in the outcome of the appeal.

and 939.32 (2003-04).[2] Proving an intent to attempt to commit a crime requires sufficient acts to demonstrate unequivocally that it was improbable the defendant would desist of his or her own free will. ***State v. Stewart***, 143 Wis. 2d 28, 31, 420 N.W.2d 44 (1988). If there is only one reasonable answer regarding to what end a defendant's acts were directed, the accused can be said to have attempted to attain that end. ***State v. Henthorn***, 218 Wis. 2d 526, 534, 581 N.W.2d 544 (Ct. App. 1998).

¶6 We are satisfied that there was only one reasonable conclusion to be drawn regarding what end Sergent intended by entering the bedroom of a sleeping, intoxicated woman, pulling off her pants, and punching her when she struggled to get away. This is not a situation such as that in ***Wulff***, where the victim awoke to find the defendant trying to force his penis into her mouth. The circumstances there plainly indicated an intent to force *oral* sex, and it was not possible to determine with certainty whether the intent was to have oral sex exclusively or in addition to also have intercourse. None of Sergent's conduct here indicated any attempt to force oral sex, and Sergent's removal of the victim's pants plainly focused on the victim's vaginal or anal areas. Therefore, counsel did not perform deficiently by failing to raise a challenge to the sufficiency of the evidence.

Juror's Impartiality

¶7 During the State's voir dire, one of the panel members who eventually served as a juror revealed that she had "two sets of friends that have been arrested for domestic violence." When asked a series of questions about

[2] All further references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

whether there was anything about her friends' situations that she would not be able to set aside, whether her emotions and knowledge of her friends' cases would keep her from judging the witnesses and deciding the case based on what she saw and heard in court, and whether similarities in her friends' cases would affect her ability to decide this case based upon the evidence and testimony, the juror repeatedly answered that she was not sure. Defense counsel did not move to strike the juror or ask her any additional questions.

¶8 "[A] criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution, as well as [by] principles of due process." ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). These constitutional protections are further codified by WIS. STAT. § 805.08(1), which provides that a potential juror who "has expressed or formed any opinion, or is aware of any bias or prejudice in the case" or who "is not indifferent in the case" shall be excused for cause.

¶9 Wisconsin recognizes three categories of juror bias: (1) statutory bias based upon certain prohibited relationships or financial interests; (2) subjective bias based upon the juror's state of mind; and (3) objective bias based upon whether a reasonable person in the juror's position could be impartial. *See* ***Faucher***, 227 Wis. 2d at 716-19. Jurors are presumed to be impartial, and a challenger to that presumption bears the burden of proving bias. ***State v. Gilliam***, 2000 WI App 152, ¶5, 238 Wis. 2d 1, 615 N.W.2d 660.

¶10 Statutory bias is not at issue in this case.

¶11 Subjective bias may be revealed through an explicit admission of prejudice or, more commonly, through a juror's demeanor and credibility while

answering questions on voir dire. *See* ***Faucher***, 227 Wis. 2d at 717-18. A prospective juror need not utter magical words or unambiguously state his or her ability to set aside bias, and may even give contradictory answers to differently worded questions, and still be found by the trial court to be capable of impartiality based upon the entirety of the court's observations. *See* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶28, 232 Wis. 2d 138, 606 N.W.2d 196 (Ct. App. 1999).

¶12 Objective bias may also be established based upon a juror's answers and conduct during voir dire, but the focus is on whether facts and circumstances reveal "such a close connection between the juror and the case" as to create a likelihood of an emotional involvement that would adversely affect the ability of any reasonable person to be impartial in such circumstances. *See* ***State v. Delgado***, 223 Wis. 2d 270, 285-86, 588 N.W.2d 1 (1999) (analysis rephrased by this court to conform with current terminology); *see also* ***State v. Lindell***, 2001 WI 108, ¶¶38, 46-48, 245 Wis. 2d 689, 629 N.W.2d 223 (explaining that ***Delgado*** was an objective bias case, even though ***Delgado*** predated the adoption of that terminology in ***Faucher***).

¶13 In the context of an ineffective assistance of counsel claim, the issue is whether counsel's performance resulted in the actual seating of a biased juror. ***State v. Koller***, 2001 WI App 253, ¶14, 248 Wis. 2d 259, 635 N.W.2d 838. To make this showing, Sergent would need to present evidence showing either that the record created during voir dire established sufficient subjective or objective bias to support a motion to strike for cause or that asking additional questions would have revealed such bias.

¶14 We are not persuaded that the juror's answers during voir dire demonstrated either subjective or objective bias. Her ambivalent answers as to

whether she could set aside her feelings about the domestic violence situations involving her friends was insufficient to establish that she either could or could not be impartial in this case. Moreover, because the juror did not explain the circumstances of those cases, we have no basis to conclude that there was such a close connection between those cases and this one, so as to create an objective likelihood of an emotional involvement on the juror's part. In short, more information from follow-up questions would have been needed to support a bias determination.

¶15 Assuming for the sake of argument that counsel's failure to ask such follow-up questions constituted deficient performance, Sergent's postconviction motion still failed to make sufficient allegations to establish prejudice. Specifically, Sergent did not indicate what evidence he would present at an evidentiary hearing demonstrating the answers the juror would have given if follow-up questions had been asked. Therefore, it was merely speculative to assert that the juror was actually biased, *see* ***id.***, ¶15, and the challenge was properly rejected without a hearing.

Amendment of the Information

¶16 Sergent argues that the court erred in allowing the State to amend the information at a time when Sergent was unrepresented but had not affirmatively waived his right to counsel, and that successor counsel was ineffective for failing to challenge the amendment or even review the preliminary hearing transcript until shortly before trial. The original information had charged Count 1 as attempted second-degree sexual assault of an intoxicated person, with Count 2 stated to be a lesser-included offense of attempted third-degree sexual assault. The amended information changed Count 1 to a theory of attempted second-degree sexual

assault of an unconscious person, and removed the reference to Count 2 being a lesser-included offense.

¶17 A criminal defendant has a Sixth Amendment right to the effective assistance of counsel "at all critical stages of the trial." *See* ***State v. Anderson***, 2006 WI 77, ¶67, 291 Wis. 2d 673, 717 N.W.2d 74. A stage in the proceeding may be deemed critical whenever the defendant may need counsel's assistance "to assure a meaningful defense." ***Id.***, ¶68. The complete absence of counsel at a critical stage of the proceedings requires automatic reversal "only in cases in which 'the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding.'" *See* ***id.***, ¶76 n.50 (*citing* ***Satterwhite v. Texas***, 486 U.S. 249, 257 (1988)). Otherwise, a harmless error analysis may be employed. ***Id.***, ¶¶74-76.

¶18 Sergent has not cited any case law holding that the amendment of an information following a preliminary hearing is a critical stage of the proceeding, and we are not persuaded that trial counsel's assistance at that stage was needed to assure a meaningful defense in this case. The amendment did not change the severity or factual basis for the charges Sergent would face at trial; it merely modified the State's legal theory to conform to the victim's preliminary hearing testimony that she was asleep when the assault began. Moreover, we cannot conclude that the entire proceeding was contaminated in light of trial counsel's testimony that, when he reviewed the preliminary hearing transcript, he did not see a basis to challenge the amendment, and the very same amendments could have been properly requested to conform to the evidence at trial. In short, Sergent has not identified anything counsel could have done differently had Sergent been represented at the time of the amendment.

Multiplicity

¶19 Sergent contends that Counts 1 and 2 of the amended information charged the same attempted act of sexual intercourse in violation of the double jeopardy clause.

¶20 The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V; *see also* WIS. CONST. art. I, § 8(1). The double jeopardy clause includes three distinct constitutional guarantees: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a conviction; and (3) protection against multiple punishments for the same offense. ***State v. Henning***, 2004 WI 89, ¶16, 273 Wis. 2d 352, 681 N.W.2d 871.

¶21 Multiplicity arises when a single criminal episode or course of conduct is charged as multiple counts rather than merged. ***State v. Hirsch***, 140 Wis. 2d 468, 471, 410 N.W.2d 638 (Ct. App. 1987). Multiple punishments may not be imposed for charges that are identical in law and fact unless the legislature intended to impose such punishments. ***State v. Patterson***, 2010 WI 130, ¶15, 329 Wis. 2d 599, 790 N.W.2d 909. Charges are different in fact if they are separated in time or place, require separate acts of volition within a course of conduct, or are otherwise of a significantly different nature. *See* ***State v. Anderson***, 219 Wis. 2d 739, 748-49, 580 N.W.2d 329 (1998). Charges are different in law if each requires proof of an element that the other does not. ***State v. Smits***, 2001 WI App 45, ¶7, 241 Wis. 2d 374, 626 N.W.2d 42.

¶22 The charges here were not identical in either law or fact. Count 1 required proof that Sergent attempted to have sexual intercourse with a person

whom he knew to be unconscious, and was based on Sergent's conduct in beginning to pull off the victim's pants *while she was asleep*. Count 2 required proof that Sergent attempted to have sexual intercourse with a person without her consent, and was based on Sergent's conduct in continuing to pull the victim's pants off and striking her *after she awoke*. Sergent could have backed off when the victim awoke and started struggling, but instead the jury was free to conclude that he made a second volitional decision to use force and continue pulling her pants off. Since the charges were not multiplicitous, counsel did not perform deficiently by failing to raise a double jeopardy claim.

Impeachment Evidence

¶23 Sergent contends that postconviction counsel should have challenged trial counsel's failure to impeach the victim with purported evidence that she had multiple prior convictions, was on probation at the time of the incident, had six more pending criminal charges, and had lied to police in the past. He argues that such evidence would have supported a theory that the victim had lied about the assault to deflect attention away from the purported fact that she had been drinking in violation of her rules of probation.

¶24 The State points out that Sergent failed to attach any affidavits or documents to support his claims about the impeachment evidence. Even assuming the allegations are accurate, we do not see how they support Sergent's theory. Another member of the household had called the police after the victim came running out of the bedroom wearing only a shirt, claiming that Sergent had assaulted her. Since the victim first made the allegations to third parties before there was any police contact, the allegations could not logically be a result of an attempt to deflect an investigation into her drinking.

¶25 Furthermore, trial counsel explained at the ***Machner*** hearing on Sergent's first postconviction motion that he had never seen a successful attack on a sexual assault victim's criminal history in a sexual assault trial, and that his strategy was to focus on mutual intoxication on the night of the incident and inconsistencies in the victim's accounts. Additionally, counsel saw little benefit in bringing up the victim's criminal history when Sergent's own criminal history was so extensive. We agree with the circuit court's assessment that counsel's performance was not deficient in that regard.

Counsel's Advice

¶26 Finally, Sergent claims that trial counsel's failure to inform him that the circuit court would need to rule on how many of Sergent's 21 prior convictions could be used for impeachment purposes influenced his decision not to take the stand in his own defense. However, Sergent's premise that the circuit court might have excluded a significant number of the convictions if it had been asked to do so is entirely speculative. Sergent has not developed any argument on appeal that persuades us that any of the convictions were likely to have been excluded. Therefore, we cannot conclude that postconviction counsel was ineffective for failing to raise the issue.

By the Court.—Order affirmed.

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