COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2009AP1325 **Cir. Ct. No. 2007CV4535**

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

STATE OF WISCONSIN EX REL. ANDREW MATTHEW OBRIECHT,

PETITIONER-APPELLANT,

V.

MICHAEL THURMER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed*.

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

¶1 HIGGINBOTHAM, J. Andrew Obriecht appeals a circuit court order denying his petition for writ of habeas corpus related to his 1998 convictions of one count of attempted second-degree sexual assault of a child, five counts of fourth-degree sexual assault and one count of disorderly conduct. On appeal,

Obriecht argues that trial counsel provided ineffective assistance by conceding "a measurable degree of guilt" on the fourth-degree sexual assault charges without obtaining an instruction on a lesser-included offense, here, disorderly conduct; and by conceding Obriecht's guilt on the disorderly conduct charge during both his opening statement and closing argument.[1] For the reasons that follow, we affirm.

Background

¶2 Obriecht was charged in a criminal complaint with five counts of fourth-degree sexual assault relating to three women in their homes or place of employment, A.M., K.B., and M.L. Obriecht was also charged with two counts relating to his behavior at a high school, one count of attempted second degree sexual assault relating to N.P. and one count of disorderly conduct relating to L.L. All counts were charged with the repeater enhancer. All six sexual assault counts stem from a series of encounters Obriecht had with four of the five women over a period of approximately twenty-four hours, spanning two days. Additional facts about these incidents will be provided in the discussion section where necessary.

¶3 All seven counts were tried to a jury. Obriecht's theory of defense for all of the sexual assault charges was that these were "boorish" acts of a nineteen-year-old boy, and while the facts fit the crime of disorderly conduct, there was no evidence that Obriecht acted for the purpose of sexual gratification,

[1] Obriecht also contends his counsel provided ineffective assistance by failing to interview and produce witnesses who would have testified about prior consensual sexual relations between Obriecht and some of the victims, and that the criminal complaint was defective. By an order dated April 28, 2010, we concluded that Obriecht was procedurally barred from raising these issues in the instant appeal because he has already litigated these issues in prior proceedings. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We therefore do not address those issues in this opinion.

and therefore the State cannot prove Obriecht is guilty of the sexual assault charges. One of the elements the State must prove for a jury to find a person guilty of fourth-degree sexual assault is that the person acted with the purpose of obtaining sexual gratification. *See* WIS. STAT. § 940.225(3m) (1995-96).[2] Obriecht's trial counsel did not ask for a lesser-included jury instruction of disorderly conduct to be read to the jury.

¶4 During his opening statement, defense counsel said to the jury:

> Count 2 will be the easiest. That is the disorderly conduct charge involving [L.L.] from February 2nd. That is the last incident, the last encounter, that happened in this series of five encounters, but it is charged as the second offense in the information. Disorderly conduct you will be told has two elements. You have to engage in violent, abusive, indecent -- in this case they charged indecent behavior -- profane, boisterous, unreasonably loud conduct or conduct which is otherwise disorderly, and you have to do that under circumstances which tend to cause a disturbance. And I think that is, in fact, what happened with [L.L.] on February 2nd, and I think … you will see that the facts fit that charge after you have determined what the facts are and after you go back to the jury room to apply the law to those facts.
>
> ….
>
> My view of the evidence, and I think this is the conclusion you should draw with regard to the sexual assault charges, is that what my client did was out of bounds, it was inappropriate, it was indecent, it was obscene, it was wrong, it is inexcusable, *but it was not sexual assault*. When you look at the definition of sexual assault that the judge will give to you and you apply that law to the facts that you find to be true, along with this requirement that all of the charges and all of the elements of each charge be proven beyond a reasonable doubt, *at the end of the case, when I have a chance to address you again*,

[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

> *I will argue to you that your proper verdict on the sexual assault charges should be not guilty….*

(Emphasis added.)

¶5 In his closing argument, defense counsel continued the theme that Obriecht's activities over the two-day span constituted horseplay, and at worst disorderly conduct. Counsel emphasized that for the jury to find Obriecht guilty of sexual assault, they must find that the State had proven beyond a reasonable doubt that Obriecht had the intent of obtaining sexual gratification from his actions. Counsel argued that the facts showed that Obriecht did not have the required intent necessary to be found guilty of the sexual assault and attempted sexual assault charges. At the conclusion of his closing argument, counsel stated:

> I concede my client is guilty of Count 2, the disorderly conduct charge concerning [L.L.]. *The other charges, the ones alleging sexual assault of those women, he is not guilty*, and by that I mean the proof in this case does not establish beyond a reasonable doubt that he had the purpose of achieving sexual arousal or gratification by the touching that he did on both of these dates, and it is for that reason on those counts I ask you to come back with a verdict of not guilty. Thank you.

(Emphasis added.)

¶6 The jury returned guilty verdicts on all seven counts. Obriecht appealed his convictions and this court affirmed; the supreme court denied his petition for review in December 2001. The subsequent procedural history of this case is quite lengthy and will not be restated here.[3]

[3] In addition to his appeal under WIS. STAT. § 974.02, Obriecht has filed motions under WIS. STAT. § 974.06 and petitions for writs of habeas corpus.

¶7 Obriecht has filed numerous post-conviction motions and writ of habeas corpus petitions stemming from his convictions in this case, all of which have been denied. This appeal arises from another habeas corpus petition that Obriecht filed. The trial court issued the writ and held a ***Machner***[4] hearing. The court denied all of Obriecht's claims. Obriecht appeals.

Discussion

¶8 In this latest appeal, Obriecht contends his trial counsel provided ineffective assistance in two ways. First, he alleges counsel conceded Obriecht was guilty of disorderly conduct on all of the sexual assault charges without obtaining a jury instruction on the charge of disorderly conduct as a lesser-included offense of fourth-degree sexual offense. Second, counsel provided ineffective assistance by conceding Obriecht's guilt on the disorderly conduct charge without Obriecht's consent, which, in Obriecht's view, was the functional equivalent of a guilty plea.

¶9 In order to succeed on a claim of ineffective assistance, a defendant must show that counsel's representation was deficient and that the deficiency prejudiced him. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). If we conclude the defendant has not proved one prong, we need not address the other. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Id.*** at 690. In other words, the defendant must establish that

[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687. To show prejudice, the defendant must demonstrate a reasonable probability that, but for the error, the outcome of the proceeding would have been different. ***Id.*** at 694.

¶10 There is a strong presumption that a defendant received adequate assistance and that all of counsel's decisions could be justified in the exercise of reasonable professional judgment. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-34, 246 Wis. 2d 648, 630 N.W.2d 752. "Reviewing courts should be 'highly deferential' to counsel's strategic decisions and make every effort … to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Domke***, 337 Wis. 2d 268, ¶36 (citations omitted). An attorney's performance is deficient only if the defendant proves that the attorney's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶31 (citing ***Strickland***, 466 U.S. at 688).

¶11 Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

I. LESSER-INCLUDED INSTRUCTION

¶12 As to the three alleged victims of fourth-degree sexual assault, Obriecht argues that his trial counsel provided ineffective assistance by failing to seek a lesser-included jury instruction on disorderly conduct.[5] He contends disorderly conduct is a lesser-included offense of fourth-degree sexual assault and that he was prejudiced by counsel's failure to seek the instruction. He contends that, because of counsel's insistence during trial that Obriecht's conduct amounted to the sort of behavior that fits the elements of disorderly conduct (abusive, indecent, profane[6]) and not sexual assault, the jury was left with the choice of either convicting Obriecht of the sexual assaults or acquitting him of all of the charges. He asserts that had the instruction been given to the jury, the jury would have had the alternative choice of convicting Obriecht of disorderly conduct. However, because the lesser-included instruction was not given to the jury, the jury had no opportunity to convict Obriecht of disorderly conduct.

¶13 The State argued before the trial court and argues on appeal that disorderly conduct is not a lesser-included offense of fourth-degree sexual assault, WIS. STAT. § 940.225(3m), and therefore trial counsel was not ineffective by

[5] It is unclear whether Obriecht means to make essentially the same argument with respect to the second-degree sexual assault victim. During opening statement and closing argument, Obriecht's trial counsel stated that all of the sexual assault charges, including the attempted second-degree sexual assault charge, were really disorderly conduct. Regardless, such an argument would fall short for the same reasons we reject Obriecht's argument with regard to the fourth-degree sexual assaults.

[6] The elements of disorderly conduct are: (1) engaging, in a public or private place, "in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct"; and (2) such "conduct tends to cause or provoke a disturbance." WIS. STAT. § 947.01(1).

failing to request a lesser-included instruction on disorderly conduct.[7] The trial court agreed with the State.

¶14 When considering whether a request for a lesser-included instruction is appropriate, the court must first consider whether the lesser offense is a lesser-included offense of the charged crime as a matter of law. ***State v. Fitzgerald***, 2000 WI App 55, ¶8, 233 Wis. 2d 584, 608 N.W.2d 391. "If so, then the court considers whether the evidence justifies the instruction." ***Id***.

¶15 "Whether the evidence supports the submission of a lesser-included offense is a question of law, which an appellate court reviews de novo." ***Id***, ¶7. A lesser-included offense instruction is appropriate only where reasonable grounds exist in the evidence both for acquittal on the greater offense and conviction on the lesser offense. ***State v. Miller***, 2009 WI App 111, ¶48, 320 Wis. 2d 724, 772 N.W.2d 188 (citation omitted). We review the evidence in a light most favorable to the defendant. ***Fitzgerald***, 233 Wis. 2d 584, ¶7.

¶16 For purposes of this opinion, we assume without deciding that disorderly conduct is a lesser-included offense of sexual assault. We therefore

[7] Although the State makes this assertion, its argument on this topic is inadequate. The State provides no lesser-included analysis. Rather, the State simply notes that Obriecht does not point to a case supporting his view that disorderly conduct is a lesser-included offense of fourth-degree sexual assault. Obviously, even if there is no such case, it does not follow that the former is not a lesser included of the latter. We further note that the State makes an inadequate argument on deficient performance. The State contends that, even if disorderly conduct is a lesser included of fourth-degree sexual assault, the "failure to request [a lesser-included disorderly conduct instruction] that the trial court, defense counsel and the State believed is not permissible is the very definition of reasonable performance." This argument is plainly illogical. If disorderly conduct is a lesser-include offense, as the State concedes for purposes of this deficient performance argument, then it follows that the prosecutor's mistaken belief is irrelevant and the job of the defense attorney would have been to explain to the circuit court why disorderly conduct is a lesser-included offense of fourth-degree sexual assault.

turn our focus on whether the jury had reasonable grounds to acquit on the greater charges and to convict on the lesser charge. *See* ***State v. Hawthorne***, 99 Wis. 2d 673, 682, 299 N.W.2d 866 (1981) ("Submission of a lesser included offense is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense."). More specific to this case, the question is whether the evidence would reasonably allow a jury, as to the three victims of fourth-degree sexual assault, to find both that Obriecht did not commit the charged assaults and did commit disorderly conduct. Based on our review of the record and viewing the evidence in a light most favorable to Obriecht, we conclude that there were no reasonable grounds in the evidence for the jury to both acquit Obriecht on the fourth-degree sexual assault charges and convict on disorderly conduct charges.

¶17 We begin by observing that, although Obriecht cites the correct test for submitting a lesser-included offense instruction to a jury, he fails to analyze the facts adduced at trial under the proper test to determine whether reasonable grounds existed in the evidence to acquit him of the fourth-degree sexual assault charges. Thus, we could reject his argument that counsel was ineffective for failing to seek a lesser-included jury instruction on the disorderly conduct charge on this ground alone. However, we nonetheless choose to evaluate the evidence under the applicable test to determine whether there were reasonable grounds in the evidence for the jury to acquit Obriecht of the fourth-degree sexual assault charges.

¶18 To prove that Obriecht was guilty of fourth-degree sexual assault, the State needed to provide evidence that Obriecht had sexual contact—that is, intentional touching with the intent to become sexually aroused or gratified—without the person's consent. WIS. STAT. § 940.225(3m).

¶19 We understand that Obriecht does not seriously dispute that he touched the intimate parts of the three women victims or that he did so intentionally. Rather, he challenges the element that the sexual contact was for the purpose of obtaining sexual arousal or gratification. We therefore analyze the evidence to determine whether there were reasonable grounds in the evidence for the jury to find both that Obriecht did not intentionally touch the victims for the purpose of obtaining sexual arousal or gratification and also find that he did engage in disorderly conduct.

¶20 Obriecht was charged with five counts of fourth-degree sexual assault involving three women: A.M., K.B., and M.L. The events at issue in this case occurred between the evenings of February 1 and 2, 1998. All three women testified; the State also called three law enforcement officers and the alleged victims who were the subjects of the two other charges tried to the jury: attempted second-degree sexual assault and disorderly conduct. Obriecht did not testify and he did not call any witnesses to testify on his behalf. Thus, the only evidence we consider was put on by the State. We begin our analysis with evidence related to A.M.

A.M.

¶21 At approximately 9:00 p.m. on February 1, Obriecht called A.M. and asked if he could see her, claiming loneliness due to friends having left town after high school. A.M. testified that she had known Obriecht when they were both in high school, but they were never in a romantic relationship. She invited him to come to her parents' home to hang out with her and her boyfriend, J.H., letting Obriecht know that her parents and brother were also at home. Obriecht arrived at A.M.'s home at approximately 9:30 p.m. A.M., J.H. and Obriecht were in the

living room, the parents were in the basement watching television, and A.M.'s brother was in his bedroom on the living room level. J.H. was engrossed in a videogame, sitting on the floor approximately two feet from the television to see the screen without needing his prescription glasses. Obriecht and A.M. sat on the couch a few inches apart talking when Obriecht reached out and touched A.M.'s breast with the palm of his hand. She knocked his hand away before he could grab her breast. Obriecht then tried to touch her left buttocks and between her legs, and she again swiped his hand away.

¶22 A.M. said nothing to J.H. about what Obriecht was doing to her, although J.H. was just five feet away from the couch. She also reported nothing to her father about Obriecht's conduct when she went to the basement to tell him that Obriecht had come to the house. Her father, R.M., testified he was concerned that there was a problem with Obriecht after seeing a "disturbed" expression on his daughter's face. Still, even after he asked her if there was a problem, A.M. replied by saying "no."

¶23 In order to get away, she asked Obriecht if he wanted a drink, and as she got up from the couch, he grabbed her buttocks. A.M. used a telephone call from a friend to get Obriecht to leave her house. Just before he left, she told him she would call him the next day. She testified that she told Obriecht she would call him so that he would leave. After he left, J.H. found A.M. crying in her bedroom and ran out to stop Obriecht, but he had already left in his car. A.M. testified she was very upset and terrified about what Obriecht did to her, and that the incident disturbed her. After her father learned what happened, he called Obriecht's home number several times, but he was unable to contact Obriecht. At approximately 11:15 p.m., Obriecht returned R.M.'s telephone calls and said he was sorry and that he did not mean to touch A.M. and to offend anybody.

¶24 During cross-examination, A.M. testified that Obriecht did not smell of alcohol or appear to be intoxicated. Obriecht was also friendly when he arrived at A.M.'s house. A.M. further testified that Obriecht was not angry towards her or angry in general, that he did not try to make her touch his private parts, make threats, or be forceful. Nonetheless, A.M. said she was very disturbed by what happened that night and that she did not give Obriecht consent to touch her.

K.B.

¶25 After leaving A.M.'s house, Obriecht drove to K.B.'s home, which she shared with her boyfriend, C.W. C.W. was also Obriecht's friend. Because C.W.'s friends often would come to the house and wait for C.W. to get off work, K.B. let him in. She sat on a chair in the living room, Obriecht sat on the couch and they watched television. At one point, Obriecht asked if he could sit next to her, which K.B. thought meant sit in the other chair in the room, so she said yes. Obriecht then sat on the arm of her chair, put his arm around her shoulder and rubbed her breast with his other hand. K.B. testified that Obriecht touched her breast only once. K.B. told him to get away from her, which he promptly did. Because she was uncomfortable staying alone with Obriecht, she told him that she was leaving to go to the farm where C.W. worked, so Obriecht had to leave too. When she was putting on her shoes, she had to dodge an attempt by Obriecht to touch her buttocks. Obriecht then left the house after K.B. told him "to get the hell out of [her] house" and drove off in a hurry. On cross-examination, K.B. testified that Obriecht was not intoxicated or smelled of alcohol and that he neither forced her nor made any threats to her. She also testified that Obriecht did not tell her to not tell anybody else that he had touched her. However, she also testified Olbriecht had no consent to touch her.

¶26 Dane County Sheriff's Office detective Craig Reis testified about two interviews he had with Obriecht concerning the incident with K.B. The first interview occurred on February 4, 1998, three days after the incident. Reis attempted to elicit an admission from Obriecht that he was at K.B.'s house on the night of February 1. However, Obriecht denied he was at K.B.'s house that night. He did say, however, that he was with K.B. on the night of January 30, 1998, a Friday night, and that they kissed and touched each other sexually. Obriecht hypothesized to the detective that if he had touched K.B. on the night of February 1 in the way K.B. reported, "it would only make sense … that it would be okay … because of what" they did on the prior Friday night. He also told the detective that if charged and tried for touching K.B., he would tell the jury that it was a joke and that the charges would be dismissed. Specifically, Obriecht told the detective that "if he told the jury about touching [K.B.] before [the night of February 1] and her not complaining, then the average person would think that it would be okay to do it again, meaning touch her sexually again." Reis testified that Obriecht told him that if K.B. *had* told him to stop touching her sexually, "that he would have gotten up and gone and sat in the other chair." Obriecht, however, refused to say whether he was at K.B.'s house on the night of February 1.

¶27 On his own initiative, Obriecht told Reis about the incident in the girls' bathroom at Sun Prairie High School involving N.P.[8] Obriecht told Reis that he had gone to the high school to see a teacher. He explained to Reis that he walked into the wrong bathroom because the sign indicating whether it was a

[8] The incident involving Obriecht's attempted second-degree sexual assault of N.P. is discussed further at paragraphs 32 and 33, *infra*.

girls' or boys' bathroom could not be seen due to the door being open. Obriecht denied touching N.P. although he admitted to opening the stall door.

¶28 Reis testified that he interviewed Obriecht again on February 5 and that during that interview Obriecht restated that he saw K.B. on the previous Friday night and that K.B. told him that their sexual contact had "felt great." Obriecht reaffirmed that if he told his side of what occurred at the high school to a jury, that it would be viewed as a joke and the charges would be dismissed. Obriecht also told Reis that he had grabbed K.B.'s "ass" at a party two or three weeks prior to the incident at K.B.'s house and that K.B. did not complain or run away. Obriecht said "that he felt it was ridiculous to have to ask [K.B.] permission after he had … touched and licked her tits two days before to touch them again." He also said that "he didn't see any difference between grabbing [K.B.'s] ass or grabbing her tits."

M.L.

¶29 On the evening of February 1, 1998, at approximately 11:00 p.m., Obriecht telephoned seventeen-year-old M.L. at her home. M.L. was a junior at Sun Prairie High School, the school Obriecht had previously attended. During that call, Obriecht made several obscene comments to M.L., such as "would you like to have sex or something," and "would you like it if I fucked you up your ass." He asked M.L. if he could go over to her home, and when she refused, he asked her to come to his house. M.L. declined and hung up on Obriecht. She thought that Obriecht was drunk and did not take him seriously.

¶30 The following evening, February 2, Obriecht showed up at M.L.'s place of employment. M.L. worked at a store located in a local mall. They met near one of the main cash register areas; customers were in the area and one of

M.L.'s co-workers was standing near them. Obriecht and M.L. engaged in a conversation while M.L. was on duty, during which time Obriecht kept staring at M.L.'s chest. During the course of this conversation Obriecht told M.L. that he wanted to "fuck" her. He also continued to stare at her chest and made certain gestures to her chest, as if to simulate touching her breasts. At one point, while M.L. was helping a customer, Obriecht grabbed her buttocks with his full hand. After M.L. finished helping the customer, she told Obriecht to leave the store. He responded by grabbing one of her breasts, at which point she loudly told him to leave, and he did. M.L. testified during cross-examination that she did not think that Obriecht's behavior was "joking."

¶31 Although Obriecht's arguments concerning the lesser-included jury instruction relate only to the three victims of fourth-degree sexual assault, it is useful to discuss the evidence related to the other two victims because Obriecht's encounters with these females occurred in the same twenty-four hour time period.

N.P.

¶32 As we indicated, Obriecht was charged and tried for attempted second-degree sexual assault stemming from an incident that occurred in a girls' bathroom at Sun Prairie High School. N.P., a fifteen-year-old high school student, was trying to use the bathroom before her gymnastics practice when her stall door was suddenly opened. She testified that the person who opened the door was Obriecht and that he was standing in front of N.P. with his pants zipper down while she was sitting on the toilet with her pants and underwear down to her ankles. N.P. screamed "freak, get out of here" throughout the entire incident and tried to push Obriecht out by pushing on the stall door. Obriecht responded by telling N.P. to "open her legs a little farther." In response, she clenched her legs

together really tight. He then reached down with his left hand and pressed the inside of her left thigh, approximately two inches from her vaginal area. In N.P.'s view, he would have touched her vaginal area if she did not have her legs tightly closed. She did not consent to Obriecht's attempt to touch her vaginal area.

¶33 N.P. testified during her cross-examination that she did not observe Obriecht pulling down his zipper and that in fact the zipper was already down when he entered the stall. She also acknowledged that she did not see Obriecht's private parts, that he did not attempt to have her touch his private parts, and that he did not attempt to touch her anywhere else. N.P. further testified that Obriecht did not threaten harm to her and that he was much larger and stronger than she was and could have forced himself upon her, but he did not do so and just left the bathroom.

L.L.

¶34 As we discuss more thoroughly later in this opinion, Obriecht was charged with disorderly conduct arising out of an incident that occurred in the girls' locker room at Sun Prairie High School. L.L. had just finished cheerleading practice and was changing her clothes in the locker room when she observed Obriecht standing approximately five feet away from her. She had a t-shirt and underwear on, but she was pulling up her jeans when she first saw Obriecht standing close to her. Obriecht asked L.L. to show him her "ass." L.L. told him to leave and finished pulling up her jeans. When she looked up Obriecht was gone.

¶35 We conclude, viewing the evidence in a light most favorable to Obriecht, that no reasonable grounds exist in the evidence for the jury to acquit Obriecht of the fourth-degree sexual assault charges and convict him of disorderly conduct. As we indicated, Obriecht does not dispute that he touched or attempted

to touch the three women on their breasts and buttocks. There is no evidence, or even a defense theory, that his touching of the women's intimate parts was unintentional.

¶36 Regarding whether Obriecht touched the women for his own sexual gratification, the only reasonable inference that could be drawn from the evidence is that Obriecht touched the women to obtain sexual gratification. With respect to A.M., he was persistent in his efforts to touch her sexually, although A.M.'s boyfriend was just five feet away and her parents were in the basement. Although Obriecht never admitted to being at K.B.'s house on the night of February 1, 1998, he expressed the belief to detective Reis that even if he had touched K.B. on February 1, no reasonable person would think that it was necessary for him to obtain K.B.'s permission to touch her because he had touched her sexually on prior occasions. Moreover, K.B. testified she was very upset after Obriecht touched her breast and after he attempted to touch her buttocks just before leaving K.B.'s house. As for M.L., he not only called her the night of February 1 and blatantly asked her if she wanted to have sex with him, but he also appeared at her job on February 2, in the presence of other customers, and asked her again whether she wanted to have sex and touched her repeatedly in spite of M.L.'s clear admonitions to him that his behavior was totally inappropriate. When this evidence is considered in the context of what Obriecht did to N.P. in the Sun Prairie High School girls' bathroom and to L.L. in the girls' locker room, we see a persistent pattern of behavior that has only one goal in mind, which is to obtain sexual gratification or arousal.

¶37 The timing of each incident highlights Obriecht's intent in touching the women. Each incident that occurred on the night of February 1, 1998 occurred within thirty minutes of the next incident. Obriecht also called M.L. at or around

11:00 p.m., shortly after the incident at K.B.'s home, and he apologized to A.M.'s father on the telephone just prior to calling M.L. This is also true of the incidents that occurred on February 2. The incidents involving N.P. in the bathroom and L.L. in the girls' locker room occurred within minutes of each other and in the same building. Obriecht then went to the mall shortly after leaving the high school and sexually assaulted M.L. Obriecht's persistence in achieving sexual gratification throughout the twenty-four hour time period between February 1 and 2 was plainly obvious.

¶38 In sum, there is no basis on which the jury could have believed the women's accounts and convicted Obriecht of disorderly conduct and at the same time acquit him of the charged sexual assaults. There is no reasonable view of the evidence that would lead to a finding that the touching of intimate body parts was not for the purpose of sexual gratification. Accordingly, even if disorderly conduct was a lesser-included offense of fourth-degree sexual assault, Obriecht was not entitled to lesser-included jury instructions and, therefore, he was not prejudiced by his counsel's failure to request such instructions. *See* ***Hawthorne***, 99 Wis. 2d at 682.

II. COUNSEL'S CONCESSION OF THE DISORDERLY CONDUCT CHARGE

¶39 Obriecht contends his trial counsel rendered ineffective assistance by conceding during opening statement and closing argument, and without his consent, that his behavior toward L.L. fit the elements of disorderly conduct, Count 2 in the criminal complaint.[9] At bottom, this is a dispute between Obriecht

[9] In response, the State's sole approach is to ask this court to credit defense counsel's testimony at the ***Machner*** hearing that he and Obriecht decided on a trial strategy to concede Obriecht's behavior amounted to disorderly conduct "in the hope that the jury would find he had (continued)

and his trial counsel over defense strategy. Thus, the question presented is whether trial counsel's strategy to concede Obriecht's guilt during his opening statement and closing argument constitutes ineffective assistance.

¶40 Before we reach the merits, we must first determine the appropriate standard to apply in determining whether counsel provided ineffective assistance. In his brief on appeal, Obriecht does not clearly state the standard we must apply. He does suggest, relying on ***United States v. Cronic***, 466 U.S. 648, 658 (1984), that because counsel conceded to Obriecht's guilt on the disorderly conduct charge during opening statements, that is, before there was a full "adversarial testing" of the charge, that we are to presume that counsel's performance was prejudicial. Obriecht relies on the following passage from ***Cronic***: "if counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." ***Id***. at 659. We conclude the circumstances of this case do not fall within the ambit of ***Cronic***.

¶41 The United States Supreme Court in ***Bell v. Cone***, 535 U.S. 685 (2002), clarified the circumstances under which ***Cronic*** applies. There, the Supreme Court explained that ***Cronic*** applies only if counsel fails to contest any part of the prosecutor's case. The Supreme Court explained in ***Bell*** that counsel's "failure must be complete" for ***Cronic***'s presumed prejudice standard to apply.

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behaved poorly," rather than fourth-degree sexual assault. Similarly, the State suggests we should not believe Obriecht's testimony. We deem the State's response as being wholly inadequate. The circuit court here made no findings regarding credibility or whether Obriecht had consented to the trial strategy pursued by defense counsel and, as an appellate court, we have no authority to make credibility determinations, let alone factual findings.

Id. at 696-97. On the other hand, even if counsel presents just a partial defense, the ***Strickland*** test applies. ***Id***. at 697-98.

¶42 We conclude, based on the record before us, that defense counsel's concession of Obriecht's guilt during his opening statement does not amount to a "complete failure" to provide, in any meaningful sense, appropriate advocacy. *See* ***Bell***, 535 U.S. at 695-96. Defense counsel mounted more than just a partial defense. Counsel put the State to its proof in presenting evidence that met the elements on all charges, including the disorderly conduct charge, beyond a reasonable doubt. Counsel cross-examined the State's key witnesses and Obriecht exercised his right to a unanimous jury verdict of guilt beyond a reasonable doubt. Indeed, defense counsel even moved for a mistrial after one of the detectives who testified on behalf of the State referred to Obriecht's probationary status, in contravention of an order granting defense counsel's motion in limine to exclude this testimony. Counsel participated fully in the verdict and jury instruction conference. We also observe the verdict form presented to the jury required the jury to answer whether Obriecht was or was not guilty of disorderly conduct, and that an instruction on disorderly conduct was read to the jury.

¶43 Accordingly, we apply the ***Strickland*** test to determine whether counsel's performance was deficient and that Obriecht suffered prejudice as a result of counsel's deficient performance. ***Strickland***, 466 U.S. at 692.

¶44 The question of whether counsel's concession of a defendant's guilt during opening statements constitutes deficient performance remains an open question in Wisconsin. The Wisconsin Supreme Court has indicated the possibility that such a concession at the opening stage of a trial might be deficient performance. *See* ***State v. Gordon***, 2003 WI 69, ¶27, 262 Wis. 2d 380, 663

N.W.2d 765. Rather than reach this issue, we assume without deciding that counsel's concession of Obriecht's guilt to the disorderly conduct charge during his opening statement constitutes deficient performance. Nonetheless, we conclude that Obriecht has not shown that counsel's performance prejudiced him.

¶45 The facts relating to the disorderly conduct charge were overwhelming and made it "difficult to imagine how [counsel] could have mounted an effective defense." ***United States v. Holman***, 314 F.3d 837, 845 (7th Cir. 2002). The charge stemmed from Obriecht appearing in the girls' locker room at Sun Prairie High School on February 2, 1998. Multiple witnesses testified that Obriecht was watching the cheerleader practice in the school hallway sometime between 3:30 and 5:30 p.m. After cheerleading practice, sixteen-year-old L.L. went into the girls' locker room to change clothes. She had a t-shirt on and was about to pull on her jeans when she saw Obriecht in the locker room approximately five feet from her. L.L. told Obriecht where the boys' locker room was, but Obriecht did not leave. Instead, he asked L.L. to show him her "ass." L.L. told him to get out and looked down; when she again looked up, Obriecht was gone. L.L. then gathered her things and left the locker room. Later, however, when a friend needed to go into the locker room, L.L. joined her, and as they started to enter, Obriecht rushed past them exiting from the girls' locker room.

¶46 City of Sun Prairie detective Christopher Olander and Dane County Sheriff's Office detective Reis testified that Obriecht first denied to them that he had been at the school and then admitted he was there. L.L.'s testimony was clear that Obriecht was in the girls' locker room, that he made rude remarks to her such as "show me your ass," and he refused to leave the locker room when L.L. told him where the boys' locker room was.

¶47 It is also readily apparent that counsel's concession was part of a coherent strategy designed to gain credibility with the jury and to 'knock the wind from the State's sails' on the more severe, sexual assault charges. In seeking to characterize all of Obriecht's behavior during this twenty-four hour period as boorish and at most, disorderly conduct, and thereby seeking to instill reasonable doubt in the jury regarding any sexual intent, counsel had no other feasible strategy but to concede the disorderly conduct charge. If the strategy had worked, at most Obriecht would have faced conviction on one count of disorderly conduct.[10] Obriecht was not prejudiced by this strategy. Like the defense concession in ***Holman***,[11] not conceding the disorderly conduct count would have thwarted the overall defense strategy here. Accordingly, we conclude that the concession made during opening statement did not prejudice Obriecht.

Conclusion

¶48 In sum, we conclude that neither defense counsel's failure to ask for a lesser-included instruction of disorderly conduct to the fourth-degree sexual assault charges, or defense counsel's concession of the disorderly conduct charge,

[10] *See* note 5, *supra*.

[11] In ***United States v. Holman***, 314 F.3d 837 (7th Cir. 2002), the defendant was charged with and tried before a jury of one count of possession of cocaine with intent to distribute, possession of cocaine, felon in possession of a firearm, and carrying a firearm during a drug trafficking crime. ***Id***. at 839. At trial, defense counsel began his opening statement conceding Count I (first possession charge). ***Id.*** at 840. During his examination of both prosecution and defense witnesses, counsel limited his questioning to the other three counts, and in closing argument again conceded guilt on the first count. ***Id.*** In concluding that counsel's concession on one of four counts did not constitute deficient performance, the court noted that "[defense counsel] vigorously cross-examined the prosecution's witnesses regarding Counts II-IV … [and r]ight after he conceded his client's guilt on Count I, [defense counsel] told the jury 'what we don't want are convictions on the other three charges." ***Id.*** at 840-41. The court concluded that this was a "coherent trial strategy that, by itself, was not deficient." ***Id.*** at 841.

constitute ineffective assistance of counsel. Rather, under the totality of the circumstances, Obriecht received a fair trial and our confidence in the result is not undermined.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.