COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2455-CR **Cir. Ct. No. 2009CF1071**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL P. BENSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Darryl P. Benson appeals from a judgment of conviction, entered after a jury found him guilty of three counts of first-degree sexual assault of a child, and from an order denying his postconviction motion. Benson argues that the trial court erred when it denied his postconviction motion

without an evidentiary hearing because he set forth sufficient evidence in his motion to show that his trial counsel rendered ineffective assistance by failing to challenge the charges against Benson as duplicitous and by failing to investigate and impeach certain State witnesses. We disagree and affirm the trial court.

BACKGROUND

¶2 In June 2009, the State filed an amended information charging Benson with sexually assaulting his stepdaughter, S.W., born on April 11, 1997. Count one alleged that Benson had "sexual contact" with S.W. at their home on February 12, 2009. Count two alleged that Benson also had "sexual intercourse" with S.W. at their home on February 12, 2009. Count three alleged that Benson had "sexual contact" with S.W. between February 12, 2009, and February 28, 2009, "in a car where travel began and ended in Milwaukee County." Count four alleged that Benson had "sexual contact" with S.W. between February 12, 2009, and February 28, 2009, at their home.[1]

¶3 S.W. testified at trial that the first time Benson assaulted her was on February 12, 2009, at their home. She testified that on that date, Benson performed a variety of sexual acts on her, including placing his penis in her "butt" more than once, placing his penis in her mouth more than once, touching her breasts, and licking her vagina.

[1] Counts three and four originally claimed that Benson had sexual contact with S.W. between February 12, 2009, and March 2, 2009. The trial court amended both counts the first day of trial to change the date of the offense to "between February 12, 2009 but before February 28, 2009."

¶4 S.W. also testified about a number of additional sexual acts that occurred after February 12, 2009. S.W. testified that during several car trips, Benson performed sexual acts with her, sometimes by forcing her to touch his penis with her hand or mouth, and sometimes by touching S.W.'s vagina, breasts, and "butt" with his hands. S.W. also testified that after February 12, 2009, Benson engaged in six or seven acts of anal or oral contact with her in their home.

¶5 Prior to deliberations,[2] the trial court read the charges to the jurors and then instructed them on the elements of first-degree sexual assault of a child, explicitly defining both "sexual contact" and "sexual intercourse," stating:

> Sexual contact is an intentional touching of the breasts and anus of [S.W.] by the defendant and/or the defendant intentionally caused or allowed [S.W.] to touch his penis. The touching may be of the breasts, anus, or penis directly, or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching. Sexual contact also requires that the defendant acted with the intent to become sexually aroused or gratified.
>
> ….
>
> Sexual intercourse means any intrusion, however slight, by any part of a person's body or of any object into the genital or anal opening of another. Emission of semen is not required.

¶6 The trial court also instructed the jurors on jury unanimity, stating:

> The defendant is charged with four counts of sexual assault. However, evidence has been introduced of more than one act, any one of which may constitute sexual contact or intercourse.

[2] The trial court also read substantially similar instructions to the jurors prior to the beginning of the trial.

> Before you may return a verdict of guilty, all twelve jurors must be satisfied beyond a reasonable doubt that the defendant committed the same acts and that the acts constituted the crime charged.[3]

¶7 The trial court also instructed the jurors to consider each charge separately, stating:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the information. Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

¶8 The trial court submitted eight special verdict forms to the jury, two for each of the four counts, explaining the forms to the jurors as follows:

> The following eight forms of verdict will be submitted to you concerning the charges against the defendant, Darryl Benson.
>
> One reading: We, the jury, find the defendant, Darryl Benson, guilty of first degree sexual assault of a child, sexual contact, as charged in the first count of the information.

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[3] The trial court's instruction was a modified version of WIS JI—CRIMINAL 517, which states:

> The defendant is charged with one count of _____. However, evidence has been introduced of more than one act, any one of which may constitute _____.
>
> Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged.

(Footnote omitted.)

> Another reading: We, the jury, find the defendant, Darryl Benson, guilty of first degree sexual assault of a child, sexual intercourse, as charged in the second count of the information.
>
> A third reading: We, the jury, find the defendant, Darryl Benson, guilty of first degree sexual assault of a child, sexual contact[,] as charged in the third count of the information.
>
> A fourth reading: We, the jury, find the defendant, Darryl Benson, guilty of first degree sexual assault of a child, sexual contact[,] as charged in the fourth count of the information.
>
> A fifth reading: We, the jury, find the defendant, Darryl Benson, not guilty of first degree sexual assault of a child, sexual contact, as charged in the first count of the information.
>
> A six[th] reading: We, the jury, find the defendant, Darryl Benson, not guilty of first degree sexual assault of a child, sexual intercourse[,] as charged in the second count of the information.
>
> A seventh reading: We, the jury, find the defendant, Darryl Benson, not guilty of first degree sexual assault of a child, sexual contact, as charged in the third count of the information.
>
> And, finally, an eighth reading: We, the jury, find the defendant, Darryl Benson, not guilty of first degree sexual assault of a child, sexual contact, as charged in the fourth count.

¶9 The jury found Benson guilty on all three counts of first-degree sexual assault of a child, sexual contact, and not guilty on the one count of first-degree sexual assault of a child, sexual intercourse.

¶10 Benson filed a postconviction motion alleging that his trial counsel had rendered ineffective assistance of counsel because the charges were duplicitous and counsel failed to object to the amended information, the jury instructions, and the special verdict forms. Benson also claimed that his trial

attorney's performance was ineffective because he failed to investigate and impeach several of the State's witnesses at trial. The trial court denied Benson's motion without an evidentiary hearing by written decision. Benson renews his claims on appeal.

DISCUSSION

¶11 The right to the effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable here by the Fourteenth Amendment, and article 1, section 7 of the Wisconsin Constitution. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 225-26, 548 N.W.2d 69 (1996). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We strongly presume counsel has rendered adequate assistance. ***Id.*** at 690.

¶12 A postconviction hearing, or "***Machner*** hearing," is necessary to sustain a claim of ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A defendant's claim that counsel provided ineffective assistance does not, however, automatically trigger a right to a ***Machner*** hearing. *See* ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A trial court may deny a postconviction motion

without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion was sufficiently supported to warrant an evidentiary hearing is a legal issue that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

I. Trial counsel did not render ineffective assistance of counsel for failing to object to the amended information, the jury instructions, or the special verdict forms.

¶13 Benson first argues that his trial counsel was ineffective because the charges set forth in the amended information were duplicitous, and as such, his trial counsel should have objected to the amended information, the jury instructions, and the special verdict forms. We disagree, concluding that the charges set forth in the amended information were not duplicitous, that any confusion was properly cured by the jury instructions, and that the special verdict forms were not improperly vague.

¶14 "Duplicity is the joining in a single count of two or more separate offenses." ***State v. Lomagro***, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983). Duplicitous charges are prohibited:

> (1) to assure that the defendant is sufficiently notified of the charge[s]; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity.

Id. at 586-87. However, the Wisconsin Supreme Court "has consistently held that acts which alone constitute separately chargeable offenses, 'when committed by

the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense' without violating the rule against duplicity." ***Id.*** at 587 (citations omitted). The State has discretion in charging such acts, limited only by the above-listed reasons for prohibiting duplicity. ***Id.*** at 588.

¶15 If the State "joins several criminal acts which can properly be characterized as a continuing offense in one count and is challenged by the defendant on grounds of duplicity, the trial court must examine the allegations in light of the purposes of the prohibition against duplicity." ***Id.*** at 589. The charging document "may be found to be duplicitous only if any of these dangers are present and cannot be cured by instructions to the jury." ***Id.***

¶16 Here, Benson argues that the State improperly offered multiple acts for each of the four counts set forth in the amended information, inadequately notifying him of the charges against him and creating a jury unanimity issue. As such, Benson contends that his trial counsel should have objected to the lack of specificity in the amended information, the misleading jury instructions, and the vague special verdict forms.

¶17 To begin, we conclude that the amended information properly notified Benson of the charges against him. The counts were set forth with enough specificity to allow Benson to plead and defend himself and to protect him from being tried twice for the same offense. *See* ***State v. Conner***, 2011 WI 8, ¶¶20, 25, 331 Wis. 2d 352, 795 N.W.2d 750. Each count set forth the date, location, and the act charged—either "sexual contact" or "sexual intercourse"—and the counts were distinguishable from each other. Counts one and two, while alleged to have occurred on the same date and at the same location, described two

different types of sexual assault, which were each defined by the jury instructions. Counts three and four were distinguishable from counts one and two by date, and distinguishable from each other by location.

¶18 Next, we conclude that the jury instructions cured any potential unanimity issue by unambiguously informing the jurors that they must unanimously agree on the specific acts that formed the basis for their verdict on each of the counts. *See* ***State v. Marcum***, 166 Wis. 2d 908, 918, 480 N.W.2d 545 (Ct. App. 1992) (holding "that any unanimity problem could have been avoided by an instruction telling the jurors that they must be unanimous about the specific act that formed the basis for each count"). Prior to deliberations, the trial court informed the jurors:

> The defendant is charged with four counts of sexual assault. However, evidence has been introduced of more than one act, any one of which may constitute sexual contact or intercourse.
>
> Before you may return a verdict of guilty, *all twelve jurors must be satisfied beyond a reasonable doubt that the defendant committed the same acts and that the acts constituted the crime charged.*[4]

[4] The parties assert that the trial court read the same unanimity instruction to the jurors prior to the start of trial. Our review of the record shows that to be true, with one small caveat. According to the transcripts, prior to trial, the court instructed the jurors: "Before you may return a verdict of guilty all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same acts and that the act constituted the crime charged." The second "act" is singular in the instruction given prior to trial, but plural in the instruction given after trial. In their briefs, the parties rely on the instruction given to the jury prior to the trial, not recognizing the subtle difference between the two instructions. Because the plural "acts" was read to the jury immediately prior to its deliberations, we rely on that instruction, but note that either instruction properly instructed the jury on unanimity when the instructions are viewed as a whole.

(Emphasis added.) The instructions properly informed the jurors that they must agree that Benson "committed the same acts" constituting the four counts charged.

¶19 Because, as we set forth above, each count was distinguishable from the others by date, location, or act charged, the jury could not have used the same act to form the basis of its verdict for one count to form the basis of its verdict on another count. As such, if the jurors agreed on "the acts constitut[ing] the crime charged" they would be agreeing on four different acts, one act for each of the counts, as required by the concept of jury unanimity.

¶20 Benson also argues that the trial court "improperly directed the jurors that they could choose to convict for either contact or intercourse, even for the same act" when it informed them that "evidence has been introduced of more than one act, any one of which may constitute sexual contact or intercourse." This argument is simply nonsensical and fails to look at the instructions as a whole. The instruction's use of the word "or" indicates that each act may be either sexual contact or sexual intercourse, not both. Furthermore, the trial court also explicitly defined for the jury both "sexual contact" and "sexual intercourse"; the terms' mutually exclusive definitions cleared up any potential ambiguity. Given the specificity of the instructions in that regard, the jurors could not have mistakenly believed that they could convict Benson of both sexual contact and sexual intercourse for the same act.

¶21 Finally, we conclude that the special verdict forms, which related back to and relied upon the amended information, were not impermissibly vague or generic. Each special verdict form referred back to a particular count in the amended information, and as we set forth above, each count was properly distinguished from the others by time, location, or activity. As such, the special

verdict forms properly "distinguish[ed] between the separately charged counts" and were not impermissibly vague or generic. *See* ***State v. Hernandez***, 192 Wis. 2d 251, 258, 531 N.W.2d 348 (Ct. App. 1995), *overruled on other grounds by* ***State v. Eugenio***, 219 Wis. 2d 391, 579 N.W.2d 642 (1998); *see also* ***Marcum***, 166 Wis. 2d at 918 ("So long as the verdict properly focuses the jury as to what facts occurred in what slice of time, there would be no prejudice.") (emphasis omitted).

¶22 Because we conclude that the charges were not duplicitous, trial counsel was not deficient for failing to object to the amended information, the jury instructions, or the special verdict forms. *See* ***Strickland***, 466 U.S. at 687. As such, the trial court did not err in denying Benson's motion without an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

II. Trial counsel did not render ineffective assistance of counsel for failing to investigate or impeach certain State witnesses.

¶23 Finally, Benson argues that his trial counsel failed to provide effective assistance of counsel because he did not properly investigate and cross-examine two State witnesses: S.W.'s mother, Sonya Benson,[5] and S.W. More particularly, Benson argues that his trial counsel: (1) failed to investigate Benson's claims that Sonya withdrew money from Benson's bank account after his arrest; and (2) failed to confront both Sonya and S.W. regarding their allegedly inconsistent statements and motives to lie. We discern no error.

[5] Sonya Benson is S.W.'s mother and was Benson's wife at the time of the sexual assaults. Because Benson, the defendant, and Sonya Benson, the witness, have the same last name, we refer to Sonya Benson by her first name for purposes of clarity.

¶24 First, even assuming that Benson's assertion that Sonya made an unauthorized withdrawal from Benson's bank account following his arrest is true, his trial counsel's failure to investigate the withdrawal or use it to impeach Sonya's testimony was not deficient. Sonya, who was married to Benson at the time of the assaults, was not the primary witness. S.W., as the victim, testified about the particulars of the sexual assaults. Sonya did not witness the assaults but testified that she learned of the assaults when she overheard Benson make highly sexualized comments to S.W. about his penis and what he wanted S.W. to do with it during an apparent "pocket dial" of his phone, thereby corroborating part of S.W.'s account. By testifying, Sonya had to admit to the jury that: (1) she had been fired from two jobs, most recently for workplace violence; (2) she had been convicted of four crimes; and (3) just prior to discovering the sexual assaults, she had been drinking and smoking marijuana.

¶25 In other words, not only was Sonya's testimony of limited importance, her credibility had already been attacked. It is highly unlikely that the jury would have come to a different result had it known that Sonya had withdrawn money from Benson's bank account without his permission following his arrest. As such, Benson's assertion does not undermine our confidence in the outcome of the trial. *See* ***State v. Ward***, 2011 WI App 151, ¶8, 337 Wis. 2d 655, 807 N.W.2d 23 ("To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome."); *see also* ***Strickland***, 466 U.S. at 697 (A court need not address deficient performance if the defendant fails to establish prejudice.).

¶26 Second, we are also unpersuaded that trial counsel's failure to impeach Sonya and S.W. regarding certain allegedly inconsistent statements prejudiced Benson. Benson contends that his trial counsel erred in failing to impeach the two witnesses with regards to the following statements:

- Sonya allegedly told police that S.W. told her that Benson sexually assaulted her on February 25, 2009, but S.W. did not tell the two police officers any specific dates after February 12, 2009. S.W. also did not testify that she was assaulted on February 25, 2009, at trial or at the preliminary hearing.

- S.W. told two police officers that there had been no contact on February 27, 2009, and did not testify to any contact on that date at the preliminary hearing. At trial, S.W. testified that Benson made her touch his penis on February 27, 2009.

- S.W. told a police officer that on February 12, 2009, the first act was penis to mouth and then penis to anus. At trial, she testified to the opposite sequence of acts.

- S.W. testified at the preliminary hearing that all the assaults happened on the weekend. At trial, she testified that there were weekday assaults as well.

- S.W. testified at the preliminary hearing and told the police and her mom about one penis-to-anus act on February 12, 2009. At trial, she said there were two penis-to-anus acts on that date.

- At trial, in direct testimony, S.W. testified that there was no sexual contact when Benson drove her to school. She testified on cross-

examination that there was penis-to-hand contact on February 13, 2009, in the car on the way to school.

¶27 With respect to Sonya, we fail to see how her statement—that S.W. told her of a sexual assault that occurred on February 25, 2009—contradicts S.W.'s testimony. S.W. testified at trial that Benson assaulted her six or seven times after February 12, 2009—consistent with Sonya's testimony that S.W. told her of an assault on February 25, 2009. We fail to see how a twelve-year-old sexual assault victim's failure to testify to a specific date of abuse, conflicts with her mother's testimony that at one time closer in time to the assault, the victim was able to provide a specific date.

¶28 Even more uncompelling is Benson's assertion that his trial counsel improperly failed to impeach the testimony of S.W. with the allegedly prior inconsistent statements set forth above. Like many young sexual assault victims, S.W. could not remember a variety of specifics concerning her various encounters with Benson. Throughout the trial, both the State and defense counsel impeached S.W. with her prior statements to the court and to law enforcement to the extent that those statements were inconsistent with her trial testimony. Moreover, the jury was also aware of those inconsistencies that occurred within the trial itself. Trial counsel's failure to pursue each and every inconsistency made by a young sexual assault victim does not undermine our confidence in the outcome of the trial, particularly when many of those inconsistencies were made within the course of the trial and were obvious to the jury. *See* ***Ward***, 337 Wis. 2d 655, ¶8.

¶29 For the reasons set forth above, we conclude that Benson's motion did not raise sufficient facts to demonstrate that his trial counsel was ineffective for failing to investigate and impeach Sonya or S.W., and therefore, the trial court

did not err in denying his postconviction motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

By the Court—Judgment and order affirmed.

Not recommended for publication in the official reports.