COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP676-CR **Cir. Ct. No. 2008CF80**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY M. BYRNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Adams County: CHARLES A. POLLEX, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jeffrey Byrnes appeals a judgment of conviction for two counts of sexual assault of a child. He also appeals an order denying his postconviction motion seeking plea withdrawal or resentencing. Byrnes contends that: (1) he was denied the effective assistance of counsel when his trial counsel

failed to move to suppress statements Byrnes made to police; and (2) he is entitled to resentencing because he was sentenced based on the inaccurate information that he had sexual intercourse rather than sexual contact with the children, resulting in excessive and overly harsh sentences. We reject these contentions, and affirm.

Background

¶2 In April 2008, the State charged Byrnes with one count of first-degree sexual assault of a child under sixteen years of age and one count of first-degree sexual assault of a child under thirteen years of age. The charges arose from allegations by Byrnes's two adopted children that Byrnes had repeatedly sexually assaulted them over a period of several years, including allegations of sexual intercourse. The complaint set forth the allegations by the children and corroborating statements Byrnes gave to police during questioning at the police station.

¶3 In February 2009, as part of a plea agreement, Byrnes pled no contest to amended charges of second-degree sexual assault—sexual contact with a child under sixteen years of age, and first-degree sexual assault—sexual contact with a child under thirteen years of age. Charges of repeated sexual assaults of each child were dismissed and read in for sentencing purposes. The court sentenced Byrnes to a total of twenty-five years of initial confinement and twenty years of extended supervision, with lifetime supervision.

¶4 In May 2010, Byrnes moved to withdraw his pleas or for resentencing, arguing that his trial counsel was ineffective by failing to move to suppress his statements at the police station and that he was sentenced based on the inaccurate information that the sexual assaults involved intercourse rather than contact only. The circuit court held a motion hearing, and Byrnes's trial counsel

testified that he did not pursue a motion to suppress because he believed a suppression motion would not be successful. The circuit court denied the motions. The court found that Byrnes was not in custody at the police station, and that, even if he were in custody, he validly waived his rights to remain silent or to have counsel present before giving the statements and never invoked his rights after the waiver. Byrnes appeals.

Discussion

¶5 Byrnes contends that he is entitled to withdraw his pleas because his counsel was ineffective by failing to move to suppress incriminating statements Byrnes made to police at the station. The State responds that Byrnes has not established that his trial counsel was ineffective. We agree with the State.

¶6 A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's performance is deficient where counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution, and the deficient performance prejudices the defense if it deprives the defendant of a fair trial whose result is reliable. ***Id.*** "'The ultimate conclusion of whether the attorney's conduct resulted in a violation of the right to effective assistance of counsel is a question of law ....'" ***State v. Ludwig***, 124 Wis. 2d 600, 607, 369 N.W.2d 722 (1985) (citation omitted).

¶7 Here, Byrnes's ineffective assistance of counsel claim is premised on his assertion that his incriminating statements to police should have been suppressed. Because we reject that underlying premise, we reject the claim of ineffective assistance of counsel.

¶8 Byrnes argues that his statements at the police station should have been suppressed because police obtained the incriminating statements from him in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966). Byrnes argues that he was in custody at the police station and that he made an equivocal statement invoking his right to counsel before waiving his ***Miranda*** rights, and that police were required to clarify his request in order to obtain a valid waiver. We assume for purposes of this opinion that Byrnes was in custody at the police station. We conclude that Byrnes provided a valid waiver of his ***Miranda*** rights, and that Byrnes's equivocal statement regarding counsel did not affect the validity of his waiver.

¶9 At the police station, the investigating detective read Byrnes his ***Miranda*** rights and asked him to sign a waiver. The following exchange then occurred:

> MR. BYRNES: The thing is I don't know what we're gonna talk about, so I don't know if I need an attorney or not. I have no idea what's even going on.
>
> DETECTIVE: Well, how can I answer that question for you? Why don't we do this. Obviously, if we—if you sign this and we start talking and I start asking you questions and you don't want to talk about them, you can say I want to stop. We won't talk anymore and then I won't ask you any more questions.
>
> MR. BYRNES: Okay.
>
> DETECTIVE: I guess, you know, my part of it is I got some questions to ask you about some stuff. I want to understand what's going on. I want you to—I want to hear what your take is on stuff, okay?
>
> MR. BYRNES: Okay.
>
> DETECTIVE: So I guess I'd like for you to talk to me and answer some questions.
>
> MR. BYRNES: Okay.

> DETECTIVE: Certainly if you don't want to, that's your right.
>
> MR. BYRNES: Okay.
>
> DETECTIVE: I can't make the decision for you.
>
> MR. BYRNES: Okay.
>
> DETECTIVE: Do you understand?
>
> MR. BYRNES: Yes.
>
> DETECTIVE: Do you have any questions?
>
> MR. BYRNES: I understand.
>
> DETECTIVE: Okay. Now if you want to talk to me, then you just sign there then.

Byrnes then signed the waiver, and did not subsequently invoke his right to counsel. Ultimately, Byrnes made incriminating statements consistent with the children's allegations.

¶10 Byrnes contends that, to obtain a valid waiver of Byrnes's ***Miranda*** rights, the detective was required to clarify Byrnes's statement that he did not know if he needed an attorney or not. Byrnes acknowledges that, in a post-waiver setting, police officers are not required to immediately cease questioning when a suspect makes an ambiguous or equivocal reference to an attorney. *See* ***Davis v. United States***, 512 U.S. 452, 462 (1994) ("To recapitulate: … a suspect is entitled to the assistance of counsel during custodial interrogation .... [I]f the suspect invokes the right to counsel at any time, the police must immediately cease questioning …. But ... [u]nless the suspect actually requests an attorney, questioning may continue."). Byrnes notes that, in ***Davis***, the Supreme Court recognized that "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney," but that the Court declined to impose a rule

requiring officers to do so. ***Id.*** at 461. Byrnes contends, however, that his pre-waiver equivocal reference to an attorney demanded clarification before police could obtain a valid waiver. We disagree.

¶11 Byrnes has not cited any controlling authority for the proposition that a pre-waiver equivocal reference to an attorney demands clarification by police officers.[1] To the contrary, it appears that Wisconsin has adopted the ***Davis*** rule for pre-waiver scenarios. *See* ***State v. Hampton***, 2010 WI App 169, ¶30, 330 Wis. 2d 531, 793 N.W.2d 901 (defendant's ambiguous reference to an attorney prior to waiver did not preclude police from continuing to question him), *review denied*, 2011 WI 29, 332 Wis. 2d 279, 797 N.W.2d 524 (No. 2009AP3040); *see also* ***United States v. Muhammad***, 120 F.3d 688, 696-98 (7th Cir. 1997) (applying ***Davis*** rule in pre-waiver scenario). Thus, Byrnes's equivocal reference to an attorney did not require police to cease questioning of him until they clarified the statement.

¶12 Moreover, the detective in this case clarified Byrnes's understanding of his rights and the voluntariness of his waiver before Byrnes signed the waiver. The detective reiterated that Byrnes had the right to stop the questioning at any time; that Byrnes had the right not to answer any questions at all; and that it was entirely Byrnes's decision whether to answer questions. The detective asked Byrnes whether he understood and if he had any questions. Byrnes stated he understood and that he did not have any questions, and then signed the waiver.

[1] Byrnes cites a decision by the Utah Supreme Court, ***State v. Leyva***, 951 P.2d 738 (Utah 1997), which limited ***Davis v. United States***, 512 U.S. 452 (1994), to post-waiver scenarios. In ***Leyva***, the Utah Supreme Court followed its own precedent that, in pre-waiver scenarios, officers must cease questioning and clarify an ambiguous reference to an attorney. The Utah decision, based on Utah state law, is not controlling here.

Byrnes did not thereafter reference an attorney. We perceive no defect in the waiver or in the police questioning on this record.

¶13 Next, Byrnes contends that he is entitled to resentencing because he was sentenced based on the inaccurate information that the sexual assaults involved intercourse rather than contact, resulting in an excessive sentence. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (a defendant has a "due process right to be sentenced upon accurate information"). Byrnes argues that he admitted only that he had sexual contact with the children, not that he had sexual intercourse with them. Byrnes acknowledges that the victims claimed that the assaults included intercourse, but argues that the subsequent medical examinations of the children did not reveal any signs of intercourse, placing those claims into question. Specifically, Byrnes contends that one victim's claims of penis-to-vagina intercourse were discredited by the subsequent medical examination establishing that her hymen remained intact, and the other victim's claims of penis-to-anus intercourse were discredited by the subsequent medical examination establishing that his anus and rectum appeared normal. Byrnes points out that, although the State reiterated at sentencing its position that the assaults included intercourse, the medical records were not introduced into evidence at sentencing. Byrnes argues that the severe sentence imposed by the court indicates that the court relied on the claims of sexual intercourse in determining its sentence. We disagree with Byrnes's assertion that this record establishes that Byrnes was sentenced based on inaccurate information.

¶14 The circuit court acknowledged at sentencing that there was conflicting information before the court as to what actually occurred between Byrnes and the children. The court noted that there was a conflict between the statements given by the children and Byrnes, and Byrnes's admission to contact

only. The court stated that it had to sort through all the information to determine which was the most credible. The court noted that the children's statements were consistent over time and, together with Byrnes's statements to police and the information in the presentence investigation report, called into question Byrnes's credibility. The court had before it the conflicting information as to the assaults, and properly weighed the information in imposing sentence. *See* ***Anderson v. State***, 76 Wis. 2d 361, 369, 251 N.W.2d 768 (1977) (credibility is for the trier of fact to decide).

¶15 Additionally, while the medical records were not introduced at sentencing, Byrnes's attorney argued that the medical records indicated that the first victim's hymen was intact and that the second victim had no evidence of anal penetration, discrediting the children's statements and Byrnes's confession. The court indicated that it considered counsel's statements. Thus, the record establishes that the medical information was brought to the court's attention at sentencing.

¶16 Moreover, we do not agree with Byrnes that the medical evidence conclusively establishes that no intercourse occurred. "Sexual intercourse" is defined by the criminal jury instructions as "any intrusion, *however slight*, by any part of a person's body or of any object, into the genital or anal opening of another." WIS JI—CRIMINAL 2101B (emphasis added). Based on this definition, "sexual intercourse" with the children would not necessarily have resulted in physical evidence.

¶17 While it is true that Byrnes pled no contest to the amended charges alleging contact only, the remaining charges of repeated sexual assaults against each child were read in for sentencing purposes. Byrnes does not explain why he

believes the court could not consider all of the information before the court in determining the appropriate sentence to impose. Indeed, that is precisely the role of the sentencing court. *See* ***State v. Damaske***, 212 Wis. 2d 169, 195-96, 567 N.W.2d 905 (Ct. App. 1997) ("'[A] court in imposing sentence for one crime can consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing.'" (citation omitted)).

¶18 Byrnes also argues that the circuit court erroneously exercised its discretion by imposing consecutive sentences without explaining why it was doing so, and by imposing an excessive length of confinement. *See* ***State v. Hamm***, 146 Wis. 2d 130, 154-57, 430 N.W.2d 584 (Ct. App. 1988). However, the court explained that it was imposing a significant length of initial confinement based on the seriousness of the crimes, the vulnerability of the children and their trust in Byrnes, the need to protect the public, and the need to provide a setting where Byrnes could get the treatment he needs. These are proper factors for the court to consider in exercising its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & nn. 9-12, 270 Wis. 2d 535, 678 N.W.2d 197. Byrnes also does not dispute that the sentences he received were well within the maximums he faced. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 ("'[a] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" (citation omitted)). We discern no erroneous exercise of the court's sentencing discretion.

¶19 Finally, Byrnes contends that the circuit court did not adequately address his motion for resentencing. Byrnes notes that the court disposed of his

motion for resentencing in one sentence. In the court's order denying Byrnes's motion for resentencing, the court stated: "For the reasons stated at the sentencing hearing, the same which is part of the record in this case, the defendant's motion to reduce the sentences previously imposed is denied." It is clear, then, that the court considered Byrnes's motion for resentencing and determined that there was no basis to disturb its original sentence.

¶20 For the reasons set forth above, we discern no error by the court in denying Byrnes's motion. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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