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DISTRICT IV

June 10, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP815-CR

State of Wisconsin v. Michael S. Koll, Jr. (L.C. #2011CF99)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Michael S. Koll, Jr., appeals a judgment convicting him of sexual assault and false imprisonment, as well as an order denying his postconviction motion. On appeal, Koll argues that he was denied the effective assistance of counsel when his attorney failed to object at trial to the admission of a written statement given by the victim to police. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).¹ We summarily affirm.

This is a sexual assault case in which Koll was convicted, after a two-day jury trial, of two counts of second-degree sexual assault and one count of false imprisonment. At trial, the state introduced the victim's written statement given to police. Koll's trial counsel did not object, and the statement was admitted into evidence. Koll argues on appeal that the failure of Koll's counsel to object to the statement as inadmissible hearsay constituted ineffective assistance of counsel.

A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. Applying the first part of the ineffective assistance test, the circuit court concluded that the victim's statement was inadmissible hearsay and that no hearsay exception applied. On appeal, the state asserts that it agrees with Koll and the circuit court on this point. Given that the parties agree the statement was inadmissible, we will assume without deciding that, in failing to object to the admission of the statement, Koll's trial counsel's performance "fell below an objective standard of reasonableness" and, thus, was deficient. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The only issue remaining for us to decide, then, is whether Koll was prejudiced by his counsel's deficient performance. For the reasons discussed below, we conclude that he was not prejudiced.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Koll argues that his defense at trial relied heavily on the jury's credibility assessments of Koll and the victim, and that the written statement unduly bolstered the victim's credibility. Koll points out that the jury came back from deliberations and asked for, and was given, a copy of the victim's written statement about two-and-one-half hours before reaching its verdict. According to Koll, this shows that the jury relied upon the statement in reaching its decision. One problem with Koll's argument is that he fails to show that the victim's written statement differed from her trial testimony or that it contained information about any key point that was not already available to the jury through the other evidence presented.

Moreover, as we now summarize in part, the record contains a substantial amount of evidence, apart from the victim's written statement, that corroborated her version of the events. The victim testified that Koll shoved her on her bed, pulled down her pants, put his penis inside her vagina, and pushed a vibrator into her vagina, all without her permission. She testified that the vibrator became stuck and that she cried and told Koll to stop, but Koll inserted his penis into her vagina again and laughed, then grabbed his clothes and left. Koll called the victim several times that day, but she did not answer.

Koll and the victim exchanged text messages later that day that were admitted into evidence. In one of the messages, Koll admitted that what he had done was "not right" and that he should have stopped. The State also presented evidence showing that, after Koll left, the victim sent text messages to her friend, Alexis Rudd, saying that Koll had raped her and describing what happened. Both the victim and Rudd testified as to the content of the text messages, and the messages were admitted into evidence. Rudd also testified that the victim came over that evening, crying and upset. Rudd accompanied the victim to the police station, where she provided her written statement, and then they went to the hospital.

The State presented testimony from Melanie Lund, the nurse examiner who conducted a SANE examination of the victim at the hospital. Lund testified as to what the victim told her about what occurred with Koll, and it was consistent with her trial testimony. Lund also testified that she made no finding of significance during her examination of the victim, but that it was common not to find injury after a sexual assault.

Koll testified at trial that he and the victim had intercourse, but that she did not fight him or tell him no. He admitted that his version of the events at trial was different from what he had previously told police when they interviewed him. Koll also acknowledged that there were certain details about what happened that he never told police, after previously having testified that he was “110 percent cooperative” with police.

Even in the absence of the victim’s written statement, the record contains sufficient evidence upon which the jury could reasonably conclude that her version of the events was more credible than Koll’s. Koll fails to demonstrate how, in light of all of the evidence, the victim’s written statement would have made a significant difference to the jury. Therefore, we conclude that Koll was not prejudiced by his counsel’s failure to object to the admission of the statement.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals