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DISTRICT II

January 9, 2019

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

2018AP133-CR State of Wisconsin v. Marco A. Tovar-Medina (L.C. #2011CF691)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Marco A. Tovar-Medina appeals from a judgment of conviction entered after a jury found him guilty of first-degree sexual assault of a child under the age of twelve and from an order denying his motion for postconviction relief. Tovar-Medina argues that he is entitled to a new trial based on the State's failure to prove the chain of custody as to a gauze pad that was part of the victim's sexual assault exam kit and the underwear she was wearing when the assault

occurred and trial counsel's ineffective assistance for not timely objecting to the admission of either piece of evidence. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] Because the alleged gaps in the chain of custody go to the weight of the evidence rather than its admissibility, trial counsel was not deficient for not objecting, and therefore we affirm.

Tovar-Medina was charged with one count of first-degree sexual assault of a child under the age of twelve and child enticement based on allegations that he digitally penetrated K.B., a six-year-old girl, in her vagina and anus while at Tovar-Medina's friend's house during a baptism party. As part of the investigation, K.B. was examined at Aurora Medical Center within hours of the assault by sexual assault nurse examiner, Tammy Burgess. At trial, Burgess testified as to how she collected and preserved for evidence a gauze pad that had been used to collect a sample from K.B.'s vaginal area. Burgess also testified as to how she collected K.B.'s clothing from the time of the assault, what procedure she used, and how she processed and sealed the materials for transport to the police department. At trial, an evidence analyst testified that the gauze pad revealed a DNA match to Tovar-Medina as did testing from the inner swath of K.B.'s underwear. On cross-examination, trial counsel questioned the State's witnesses regarding their handling of the evidence, and following the close of evidence, trial counsel moved to strike certain evidence based on a lack of testimony regarding the chain of custody of those items. The circuit court denied the motion.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

A jury found Tovar-Medina guilty, and he was sentenced to a long prison sentence. Tovar-Medina filed a postconviction motion requesting a new trial based on the State's purported "failure to provide a proper chain of custody foundation as to the DNA analysis" pertaining to "how the gauze pad or victim's clothing was obtained or whether it was done pursuant to appropriate procedures." He also claimed that his trial counsel was ineffective for not timely objecting to the introduction of both pieces of evidence. The circuit court denied the motion. Tovar-Medina appeals.

We review the question of whether the State demonstrated sufficient proof to establish a chain of custody under an erroneous exercise of discretion standard. ***State v. McCoy***, 2007 WI App 15, ¶8, 298 Wis. 2d 523, 728 N.W.2d 54 (2006). We will uphold a circuit court's exercise of discretion if the circuit court "considered the pertinent facts, applied the correct law, and reached a reasonable determination." ***Id.*** With respect to chain of custody issues, the law "requires proof sufficient 'to render it improbable that the original item has been exchanged, contaminated or tampered with.'" ***Id.***, ¶9 (citation omitted). WISCONSIN STAT. § 909.01 provides, "The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "A perfect chain of custody is not required," and "[a]lleged gaps in a chain of custody 'go to the weight of the evidence rather than its admissibility.'" ***McCoy***, 298 Wis. 2d 523, ¶9 (citation omitted).

Tovar-Medina argues that Burgess was unable to testify as to how the gauze pad was utilized, what it touched, or who it touched, and, on cross-examination, Burgess was unsure if K.B. brought the clothing with her to the hospital. Burgess testified that she has "never gone into the restroom with a patient. I was not trained to do that. I was trained to explain to them what to

do, exactly how to handle the two-by-two gauze, and then hand it back to me. And then I packaged it and did what I needed to do." Burgess also testified in detail about the procedure used to collect K.B.'s clothing to preserve it for evidence.

We conclude that the circuit court properly exercised its discretion in admitting the DNA evidence from both the gauze pad and K.B.'s underwear. The chain of custody evidence was sufficient to support the circuit court's conclusion that the DNA evidence was admissible. First, "[t]he standard for the admission of exhibits into evidence is that there must be a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed." ***Id.***, ¶18 (citation omitted). This standard has been satisfied in this case. The State offered testimony from multiple witnesses who testified as to how the gauze and underwear evidence was collected, catalogued, turned over to the police, stored securely, transported to the Wisconsin State Crime Lab, and, finally, tested. We are also satisfied that the witnesses provided sufficient foundation and authentication that the evidence in question "is what its proponent claims" it is. *See* WIS. STAT. § 909.01. Tovar-Medina submits no evidence of tampering or contamination of the evidence, and the case law is clear that "the government need only show that it took reasonable precautions to preserve the original condition of the evidence, it does not have to exclude all possibilities of tampering with the evidence." ***McCoy***, 298 Wis. 2d 523, ¶19 (citation omitted). Second, Wisconsin law is clear that "[a]lleged gaps in a chain of custody 'go to the weight of the evidence rather than its admissibility.'" ***Id.***, ¶9 (citation omitted). The gaps in the chain alleged by Tovar-Media do not impact the admissibility of the DNA evidence, only the weight of the evidence as determined by the jury. The DNA evidence from the gauze and K.B.'s underwear was properly admitted.

Tovar-Medina also alleges that trial counsel was ineffective for not timely objecting to the admission of the gauze and underwear evidence on chain of custody grounds. In order to succeed on a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** The prejudice prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If the defendant fails to establish one prong, we need not address the other. *See* ***id.*** at 697.

We conclude that trial counsel was not ineffective for failing to object to the admission of the DNA evidence as there was no basis to exclude the evidence, and trial counsel properly challenged the gaps in the chain of custody on cross-examination. As we established above, the DNA evidence from the gauze and K.B.'s underwear was properly admitted by the circuit court. On the final day of trial, counsel did move to strike and order the jury to disregard certain evidence based on the State's failure to establish the chain of custody, which was denied by the circuit court. Timely or not, trial counsel's motion was properly denied. *Cf.* ***State v. Butler***, 2009 WI App 52, ¶¶8, 16, 317 Wis. 2d 515, 768 N.W.2d 46 (noting that lawyer is not ineffective for not making a motion that would have been denied). Further, assuming there were issues concerning the chain of custody, any gaps in the chain would go to the weight of the evidence for the jury to consider, not its admissibility. Trial counsel could, and did, attack the gaps in the

chain during cross-examination and closing argument. Trial counsel did not perform deficiently, and, therefore, we need not reach the prejudice prong.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals