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DISTRICT II

February 28, 2024

To:

Hon. Phillip A. Koss
Circuit Court Judge
Electronic Notice

Michele Jacobs
Clerk of Circuit Court
Walworth County Courthouse
Electronic Notice

Sonya Bice
Electronic Notice

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

2023AP188-CR State of Wisconsin v. Cullen C. McAdory (L.C. #2018CF373)

Before Neubauer, Grogan and Lazar, 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).

Cullen C. McAdory appeals from a judgment and an order denying his postconviction motion alleging ineffective assistance of counsel. 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 (2021-22).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

I. Facts

The State charged McAdory with three counts of sexual assault of then-thirteen-year old P.W.[2] The case was tried to a jury in October 2020. Multiple witnesses testified at the trial, including P.W., her mother, and Detective Sergeant Erik Voss, who oversaw the investigation of the case.[3] The jury also saw the video of P.W.'s forensic interview and heard testimony from the forensic interviewer. McAdory did not call any witnesses and chose not to testify. The defense theory of the case, presented through cross-examination of the State's witnesses, was that P.W. was not credible and that Voss did not adequately investigate or gather evidence, and therefore, there was no physical evidence to corroborate P.W.'s allegations.

The jury found McAdory guilty of all three counts. In January 2021, the trial court sentenced McAdory to ten years of initial confinement followed by five years of extended supervision on count one and twelve years of initial confinement and fifteen years of extended supervision on count two, to run concurrently. On count three, the court sentenced him to twelve years of initial confinement and fifteen years of extended supervision to run consecutively to counts one and two; however, it stayed that sentence for fifteen years of consecutive probation.

McAdory filed a postconviction motion in May 2022, alleging that his trial counsel provided ineffective assistance in failing to object during cross-examination of two of the State's witnesses. First, he contended his trial counsel should have objected when Detective Sergeant

[2] We use initials to protect the victim's privacy. *See* WIS. STAT. RULE 809.81(8).

[3] The State also presented testimony from P.W.'s brother and three other-acts witnesses who told the jury about McAdory's prior sexual assaults of two other victims and his juvenile adjudications in those cases.

Voss "vouched" for P.W.'s credibility in violation of ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) ("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."). Specifically, when McAdory's trial counsel asked Voss whether he sought all available evidence in this case instead of simply relying on P.W.'s allegations, Voss responded:

> my belief as an investigator with this, based on several years of experience and training, is that *there was credibility to the victim's statement*. And contrary to TV and the movies, forensic evidence is a very small portion of what we end up getting. Lots of times it is one person's word against another. The bloody knife, the fingerprint, whatever the case may be, the semen on the floor, okay, those are great. And we do collect those. But by far, and I mean by far, the type of evidence that we have is from the statement and whether we believe it to be credible or not. And *I believe [P.W.] to be credible*.

(Emphases added; formatting altered.) McAdory argued his counsel acted ineffectively in not objecting to Voss's statements about P.W.'s credibility.[4]

Second, McAdory asserted his trial counsel should have objected to an answer P.W.'s mother gave during cross-examination that referenced the victim's attempted suicide because a pretrial order prohibited all references to any suicide attempt. The mother referenced the attempted suicide in response to trial counsel asking: "Do you know if there's any record or anything that shows that [P.W.] suffered physical trauma as a result of this alleged incident?" P.W.'s mother responded: "No. Not that I know of, no. At least besides trying to kill herself and that. That's about it." Outside the presence of the jury, the State indicated it did not plan to

[4] The postconviction motion also asserted that trial counsel provided ineffective assistance for asking the question that elicited the improper response. However, McAdory abandoned this particular argument at the ***Machner*** hearing and did not raise it on appeal. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

"elicit anything regarding [the attempted suicide]" and inquired as to whether P.W. should be told about her mother's testimony and reminded not to reference the attempted suicide. In response, the trial court noted that defense counsel had not objected, "probably for strategic reasons, not wanting to call attention to it. I actually thought of correcting [the mother], but, again, it would have been the same effect. So, um, right, just make sure we'll talk to [P.W.] about that, but make sure you instruct any other witness that that's not to be referred to."

The postconviction court held a ***Machner*** hearing on the motion. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Trial counsel testified and explained why he did not object to either statement. With respect to Voss vouching for the victim's credibility, counsel explained that he saw the trial court acknowledge the vouching and got the impression the court would address it after the jury left the courtroom. He also explained that he watched the jurors carefully, but because they were all wearing masks, he could not get a good read as to whether Voss's statement negatively impacted the defense case. Trial counsel decided not to object because he did not want to draw attention to the statement. He testified that objecting "simply draws the attention back to the testimony" and "reinforces the testimony," and he did not want to do that. Trial counsel also explained that the questions to Voss about his incomplete investigation, which led Voss to get angry, would help the defense.

With respect to the mother's statement referencing the suicide attempt, trial counsel said the same principle applied—he made a decision to let the statement go to avoid drawing the jury's attention to it. He also testified that he expected the trial court would address the violation of the pretrial order.

The postconviction court denied McAdory's motion. It found that it was P.W.'s testimony, not Voss's, that convinced the jury. The court agreed that objecting to Voss's statement would have highlighted the testimony and made it worse. It also rejected McAdory's ineffective assistance claim regarding not objecting to the mother's attempted suicide reference, finding that the mother's testimony was "not very clear. She had difficulty with timelines," and the "really brief[]" minor reference "without even giving a time reference of when this attempt took place or the cause of it" had no negative impact. The court also pointed out that the State did not reference either of these answers during its closing argument.

McAdory appeals seeking a new trial.

II. Analysis

The Sixth Amendment guarantees a defendant the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 685-86 (1984); ***State v. Savage***, 2020 WI 93, ¶27, 395 Wis. 2d 1, 951 N.W.2d 838. To prevail on an ineffective assistance claim, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***Savage***, 395 Wis. 2d 1, ¶27 (quoting ***Strickland***, 466 U.S. at 687). We review an ineffective assistance of counsel claim using a mixed standard of review. ***Savage***, 395 Wis. 2d 1, ¶25. The circuit court's factual findings, including those regarding trial counsel's conduct and strategy, will not be overturned unless they are clearly erroneous, but we review de novo whether counsel's conduct constitutes constitutionally ineffective assistance. ***Id.*** If the defendant fails to establish either prong, we need not address the other. ***Id.***

To demonstrate deficient performance, the defendant must show that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by

the Sixth Amendment." ***Strickland***, 466 U.S. at 687; ***Savage***, 395 Wis. 2d 1, ¶28. We presume that counsel's conduct fell within the wide range of reasonable professional assistance, and we will grant relief only upon a showing that counsel's performance was objectively unreasonable under the circumstances. ***Savage***, 395 Wis. 2d 1, ¶28. Prejudice is demonstrated by showing a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. ***Id.***, ¶32.

As noted, McAdory must prove both that his trial counsel acted deficiently and that he was prejudiced by trial counsel's conduct. We decline to address the deficiency prong because we conclude McAdory fails to show that there is a reasonable probability that the result of the trial would have been different if his trial counsel had objected when Voss and P.W.'s mother gave their answers.

McAdory's prejudice claim is conclusory. With respect to Voss's testimony, he alleges only that the ***Haseltine*** violation prejudiced him and that the ***Haseltine*** court concluded that the improper vouching in ***Haseltine*** was not harmless. McAdory asserts that Voss's improper vouching was "impactful testimony" that prejudiced him. This is insufficient to convince us that, had counsel objected, McAdory would have been acquitted. First, the postconviction court found the vouching came buried in a "long lecturing answer"; Voss came across as a testy, argumentative witness, which "was completely to the benefit of the defendant"; and that the jury convicted because of P.W.'s testimony, not Voss's vouching. McAdory does not challenge the court's findings; he ignores them. Second, ***Haseltine*** did not hold that improper vouching is *never* harmless. Here, the court found that Voss's improper vouching did not prejudice McAdory. McAdory's conclusory claims disagreeing with the circuit court's analysis are unpersuasive.

With respect to the attempted suicide reference, McAdory offers even less argument. He says only that counsel's failure to object prejudiced him. To prove prejudice, McAdory must establish that specific errors by counsel "'*actually* had an adverse effect on the defense.'" ***State v. Balliette***, 2011 WI 79, ¶24, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). McAdory has made no argument in this regard. Significantly, the postconviction court found that the mother's reference to the attempted suicide was a minor, brief statement that the jury almost certainly overlooked. McAdory does not challenge this finding. Instead, he ignores it completely.

McAdory has failed to demonstrate that any alleged deficiencies prejudiced him, and therefore his ineffective assistance claim fails.

Therefore,

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.

Samuel A. Christensen
Clerk of Court of Appeals