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July 2, 2024

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

2022AP2108-CR

State of Wisconsin v. Kevin Lavell Burkes (L.C. # 2018CF887)

Before Donald, P.J., Geenen and Colón, 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).

Kevin Lavell Burkes appeals his judgment of conviction for numerous counts relating to human trafficking. He also appeals the order denying his postconviction motion, in which he alleged ineffective assistance of counsel for failing to sufficiently impeach the victim regarding her prior inconsistent statements. 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 summarily affirm.

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

In April 2015, police interviewed the victim, “Angela,”² at the Sexual Assault Treatment Center at Aurora Sinai Hospital in Milwaukee. Angela, who was seventeen years old at the time, told police that she had met another juvenile named China, after China overheard Angela say she needed money to help her mother pay rent. China introduced Angela to her boyfriend, Prince, and Angela began working for Prince as a prostitute.

Angela said that after a few days Prince “had to leave,” so he dropped her and China off at a residence in the area of North 52nd Street and West Burleigh Street in Milwaukee. There, China introduced Angela to another man named Kevin. Kevin directed Angela to take off all her clothes to show that she was “really about that life,” which she understood to mean “sex and prostitution and drugs, things like that.”

Angela stated that Kevin dropped China off at a nearby house, and then drove Angela to Wausau, where they went to a strip club. According to Angela, Kevin told her she could be an exotic dancer; she told him she was only seventeen years old, but Kevin said that was “okay.”

Angela stated that Kevin then drove her to his home in Wittenberg, Wisconsin. There, Angela said she met Kevin’s wife, Lori, and his adult son, Cody. Angela stated that Kevin “grabbed [her] by the hair” and told her to have sexual intercourse with Cody. Another time, Angela said Kevin woke her up by using a taser on her leg, and then forced her to have penis-to-vagina intercourse with him, and mouth-to-vagina intercourse with Lori.

² We use a pseudonym to refer to the victim throughout this opinion. *See* WIS. STAT. RULE 809.86.

Angela said Kevin subsequently took her to another strip club in Wausau, where she danced after he gave her a Xanax. While driving back to Kevin's residence in Wittenberg, Angela stated that Kevin stopped the vehicle, "grabbed her by the neck," and poured urine into her mouth from a beer can.

Angela further stated that she and Kevin drove back and forth between Wittenberg and Milwaukee several times. One time, she said they drove to Milwaukee for a drug transaction, and then Kevin forced her to have penis-to-vagina intercourse with him in the basement of a residence in the area of North Richards Street and Capitol Drive. Angela said during another trip to Milwaukee, Kevin took her to a residence where there were four other males present. He told her he wanted her to have sexual intercourse with them. He then forced her to suck on the penis of a brown pit bull while the men watched, threatening to beat her if she did not comply.

Angela stated that she spent approximately two weeks with Kevin, until he "dropped her off on a freeway" in Milwaukee. She waited a few days before calling police to report the experience. She told the officer interviewing her that she thought Kevin's last name was Branch. Officers showed her a photo array which included a man named Kevin Branch who was known to police and generally matched Angela's description of Kevin; however, Angela did not identify anyone in that photo array.

In February 2018, Angela contacted police after she saw a picture of Kevin in a database she was reviewing with her lawyer, and discovered his last name was actually Burkes. Police showed Angela a new photo array that included Burkes, and Angela identified him as the person who committed the acts she had reported in April 2015.

Burkes was arrested and charged with human trafficking; trafficking of a child; two counts of exposing intimate parts; second-degree sexual assault; one count of child enticement; and one count of child enticement as a party to a crime. The State subsequently filed an amended information prior to trial adding another count of child enticement causing mental harm, based on Angela's allegation involving the pit bull.

The matter proceeded to trial in February 2020. Angela was the primary witness for the State. She testified as to her experiences with Burkes, including driving to Wausau and Wittenberg, and meeting Lori and Cody. Angela also stated that Burkes had threatened her with a gun several times, and made threats against her family. On cross-examination, Burkes's counsel asked Angela whether she had ever previously mentioned Burkes having a gun, to which she replied she did not recall, though she was "certain" that there was a gun.

Angela also described the incident with the pit bull, and the incident where Burkes forced her to drink urine, although in her testimony she said that he had urinated directly into her mouth rather than pouring it from a beer can. She had difficulty at times remembering the timeline of events, and suggested that Burkes had drugged her.

The police officer who interviewed Angela also testified. On cross-examination, Burkes's counsel elicited testimony from the officer that Angela's account of drinking urine was different than what she had initially reported. Counsel also elicited testimony from the officer that Angela had previously mentioned being given Xanax at the strip club by Burkes, as well as alcohol, but not any other drugs.

The officer also testified that Angela's description of the residence in Wittenberg matched the description of Burkes's residence in Department of Corrections records, as Burkes

was on probation during that time. Additionally, the descriptions of Kevin’s vehicles provided by Angela—a black four-door sedan and a gold sport utility vehicle—were consistent with the description provided by Burkes’s probation agent, who testified that Burkes had a black Honda Civic and a tan Dodge Durango at that time.

Burkes testified in his own defense. He testified that he did not know Angela, and he “just [did not] understand where this is coming from.” He also confirmed that he was on probation in April 2015; that he had a wife named Lori; that she had a son named Cody, who was twenty-three years old in 2015 and lived in Wittenberg; that he had a pit bull at that time; and that he and Lori had a black Honda Civic and a tan Dodge Durango at that time.

The jury found Burkes guilty of all counts. The trial court imposed a global sentence of thirty-five years of initial confinement and twenty years of extended supervision.

Burkes filed a postconviction motion claiming ineffective assistance of trial counsel. Specifically, Burkes argued that counsel had failed to impeach Angela on many inconsistent statements. In particular, Burkes emphasized that in her testimony Angela talked about Burkes threatening her with a gun when she had not previously reported that Burkes was armed with a gun. Burkes also pointed out that Angela testified that he had threatened to harm her family; she particularly noted that Burkes had pretended to call her mother and made threats about hurting her family if they contacted the police just before he let her out on the freeway. Angela had never mentioned this phone call before her testimony.

Burkes observed several other inconsistencies in Angela’s testimony, including where she initially met Burkes—whether it was in the attic or in the alley behind the house where Prince dropped her and China off; whether there were other people in the car when Burkes

dropped her off on the freeway; and inconsistencies in statements Angela made about her experiences with Prince and China, such as the reason Angela stopped working for Prince. Burkes further noted Angela's comments at trial about being drugged by Burkes, when she had previously only mentioned the Xanax she received at the strip club. Additionally, Burkes observed that Angela's description of Kevin varied; in her initial description to police she said he had short hair, but in her testimony at his probation revocation hearing she described him as bald. Burkes contended that overall Angela's testimony about the timeline of events was vague and inconsistent, and asserted that impeaching Angela on all of her inconsistent statements would have negatively impacted her credibility with the jury.

A postconviction hearing was held in September 2022. The trial court heard testimony from Burkes's trial counsel, who stated he had been a criminal defense attorney for almost twenty years, and had done at least 250 to 300 jury trials, "[a] number" of them involving sexual assaults. Counsel testified that he recalled that Angela had "particular knowledge" about Burkes—such as his wife and stepson's names, his dog, his vehicles, and the description of his house in Wittenberg—and that counsel considered this to be "a significant problem," given that Burkes claimed that he had never met Angela.

In describing his strategy for inconsistent statements, counsel stated that he does not "pick apart every single inconsistent statement," but rather focuses on "big ones" that "make the most sense in the context," because there are "certain things that aren't worth arguing over and juries aren't receptive to certain things." To that end, he stated that during cross-examination he may point out inconsistencies without "hammer[ing] the point" if he thinks that is sufficient for an effective cross. Counsel further explained that in this case, he did not want the jury to view him as "bullying" Angela by being too aggressive and he would have been "cognizant of being

overbearing,” because “without a doubt” she was a “sympathetic victim.” Counsel also noted that generally he wants a victim’s time on the witness stand to be “as short as possible.”

After the hearing, the trial court adopted the State’s findings of fact and conclusions of law, which stated that counsel’s strategy during cross-examination was reasonable, given that Angela was a sympathetic victim of sexual assault. Those findings further stated that Angela’s testimony—which included a “significant number of personal factors” about Burkes—was credible, and that Burkes’s testimony was not credible. As a result, “the avenues [Burkes] claims should have been explored [by counsel] would not have undermined [Angela]’s credibility enough to reach an acquittal.” The trial court therefore denied Burkes’s postconviction motion. This appeal follows.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that trial counsel’s performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that trial counsel’s actions or omissions were “professionally unreasonable[.]” *Id.* at 691. To prove prejudice, the defendant must show there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. When we review a claim of ineffective assistance of counsel, we uphold the trial court’s findings of fact unless they are clearly erroneous. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. Whether the facts satisfy the deficiency and prejudice components are questions of law that we review *de novo*. *Id.*

Burkes’s claim of ineffective assistance focuses on counsel’s failure to fully impeach Angela regarding her inconsistent statements. The record indicates that counsel did address

Angela's inconsistent statements on several topics, such as whether Burkes had a gun, whether she had been given drugs by Burkes, and the manner in which he forced her to drink urine. However, Burkes argues that counsel's efforts at impeachment were not sufficient. Specifically, Burkes argues that counsel was required to introduce substantive evidence relating to the prior inconsistent statements that he challenged in order to properly execute impeachment, citing a treatise on trial technique. However, he offers no binding authority to support this contention.

Burkes further argues that counsel completely failed to impeach Angela on many other inconsistencies, as described above. At the postconviction hearing, counsel explained that his cross-examination style was part of his trial strategy—to choose the “most important inconsistencies” with which to impeach Angela. As a seasoned criminal defense attorney, counsel explained that he conducts his cross-examination of a witness “within the context of the trial,” and that determinations regarding impeachment should be made in accordance with “the totality of the cross-examination.”

“Counsel's decisions in choosing a trial strategy are to be given great deference.” *State v. Balliette*, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. Such strategy decisions “will not constitute ineffective assistance of counsel so long as they are ‘reasonably founded on the facts and law under the circumstances existing at the time the decision was made.’” *State v. Smith*, 2016 WI App 8, ¶14, 366 Wis. 2d 613, 874 N.W.2d 610 (citation omitted).

Counsel's strategy, as explained at the postconviction hearing, is reflected in the record. During trial, he highlighted Angela's inconsistencies regarding the gun, drugs, and the urine incident. In contrast, counsel did not impeach Angela on details such as the exact location in the residence where Angela first met Burkes, nor did he discuss the details surrounding her departure

from Burkes on the freeway. He also did not bring up any inconsistencies relating to Prince and China, as Angela admitted to making money through prostitution when she was with them.

Moreover, as the State asserts, because Burkes's theory of defense was one of identification and not that the incidents were consensual, the inconsistency relating to whether Burkes had a gun was not highly relevant. Additionally, although counsel failed to address Angela's varying descriptions of Burkes, the descriptions were not actually entirely inconsistent; other than wavering between his having short hair or being bald, the rest of her description—that he was heavy and had a short beard—was consistent.

In short, the record demonstrates counsel's strategy of pursuing impeachment on certain inconsistencies that, as he testified, he felt were "worthwhile," while "balancing the impact" of his questions on the jury. *See Smith*, 366 Wis. 2d 613, ¶14. We are therefore not persuaded that his performance was professionally unreasonable. *See Strickland*, 466 U.S. at 691.

Furthermore, Burkes has not demonstrated that he was prejudiced. Although Angela's statements and testimony contained some inconsistencies, she testified credibly regarding many personal details about Burkes, such as his home in Wittenberg, his wife and stepson, his vehicles, and the breed of dog he had. Impeaching Angela on the other inconsistencies pointed out by Burkes would not have undermined her credibility to the extent that there is a reasonable probability that the outcome of the trial would have been different. *See id.* at 694.

Therefore, Burkes's claim of ineffective assistance of counsel fails. *See id.* at 687. Accordingly, we affirm his judgment of conviction and the order denying his postconviction motion.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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