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January 15, 2013

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

2010AP1887-CR State of Wisconsin v. Jason P. Witak (L.C. # 2008CF1187)

Before Lundsten, P.J., Higginbotham and Kloppenburg, JJ.

Jason Witak appeals a judgment of conviction for second-degree sexual assault of a child. He also appeals an order denying his postconviction motion. Witak contends that he is entitled to a new trial based on ineffective assistance of trial 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 (2009-10).[1] We summarily affirm.

Witak was charged with one count of second-degree sexual assault of a child, and proceeded to a jury trial. In closing arguments, defense counsel argued that the elements of sexual assault had not been established because there was no evidence that Witak had sexual contact with the victim for his own sexual gratification. Counsel argued that the alleged sex acts—hand- and mouth-to-vagina contact—were acts that are more likely to be performed for the gratification of the recipient. Following conviction, Witak filed a motion for a new trial based on ineffective assistance of trial counsel for, among other things, making the gratification argument.[2] The circuit court denied the motion.

Counsel renders ineffective assistance if counsel's performance was deficient and the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Witak asserts that counsel's performance fell outside the wide range of professionally competent assistance by presenting a gratification argument that was offensive, was contrary to

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Witak's prior appellate counsel filed a no-merit appeal addressing each of the issues raised in the postconviction motion. However, at that time, the circuit court had not yet issued an order denying the postconviction motion. We issued an order stating that we did not have jurisdiction over the circuit court's decision on the postconviction motion because the court had not reduced its decision to writing. We directed counsel to file a notice of appeal from that order once it was reduced to writing and entered, and to move to consolidate the two appeals. When counsel failed to respond to our order, we directed counsel to explain his basis for concluding that the arguments raised in the postconviction motion would be frivolous on appeal if they were not frivolous when raised in the postconviction motion. When counsel again failed to respond to our order, we rejected the no-merit report and converted the no-merit appeal to an appeal. We informed successor counsel that he had the option to file either a brief or a no-merit report. Counsel indicates in the appellant's brief that the only issue with merit for appeal is the issue concerning the offensive closing argument.

common sense, and served no tactical purpose. *See* ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992) (explaining deficient performance for ineffective assistance of counsel purposes). Witak argues that counsel's deficient performance prejudiced the defense because, absent the offensive argument, there was a reasonable probability of a different result following trial. Witak points out that, although there was strong unrebutted evidence of physical contact between Witak and the victim, there was a lack of confirming DNA evidence or a complete admission on his part. We reject both contentions.

In arguing that the State had not proven that the contact was intended for Witak's gratification, counsel stated:

> [I]f this were an allegation that a certain person, we'll call that person Joe, that Joe had a child touch him on his genitalia, … there would be a reasonable inference … that Joe is doing that for his sexual arousal or gratification.
>
> What do we know about digital stimulation … allegedly … of a man to a female? What do we know about oral stimulation? Is it possible? Sure, it's possible that he is doing it for his own sexual arousal or gratification. But the much, much, much far in a way the more reasonable presumption, unless there is some contrary evidence that supports that assertion that it was for his arousal and gratification, the contrary notion would be that it would be much more acceptable and reasonable, would be that it was for the recipient.

We conclude that this argument did not deprive Witak of the effective assistance of counsel. Essentially, the challenged argument stated that, in general, hand- or mouth-to-genital contact is intended for the sexual gratification of the recipient. Counsel did not make any specific assertion as to the facts in this case. While we agree that counsel's argument was both weak and potentially offensive to jurors, we do not agree that it is the type of argument that rendered counsel ineffective. The circuit court found at the postconviction motion hearing that

Witak's trial counsel had few options for arguments to make in Witak's defense, and Witak does not dispute that finding. In light of the very limited defense arguments available, counsel's argument that the type of contact alleged is generally intended for the gratification of the recipient, while certainly weak, appears to have been one of the few arguments available to the defense.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals