COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP2587-CR
2012AP2588-CR

Cir. Ct. Nos. 2008CF2184
2009CF1330

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LYNN A. MOLLER,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. In these consolidated appeals, Lynn Moller appeals judgments of conviction for three counts of child abuse in violation of WIS. STAT. § 948.03(3)(b), and orders denying her motion for postconviction relief. Moller contends the circuit court erred in joining the two cases for trial and she further

contends that she is entitled to a new trial because she received ineffective assistance of counsel. We affirm for the reasons discussed below.

BACKGROUND

¶2 In November 2008, the State filed a complaint against Moller alleging that she was guilty of two counts of abusing a child, C.M., for whom she had provided child care services. C.M. was approximately two years old at the time of the alleged abuse. On April 13, 2009, the State sought permission from the court to present evidence that Moller had caused physical harm to C.M. on occasions other than in the charged instances, and that she had caused physical harm to other children for whom she had provided child care services, including a child named M.J. Then on April 14, 2009, the State filed an amended information charging Moeller with three counts of reckless child abuse of C.M., and one count of reckless child abuse of M.J.

¶3 In July 2009, the circuit court denied the State's motion to introduce other acts evidence and, on Moller's motion, dismissed the State's charge against Moller pertaining to M.J., which had been added in the amended information.

¶4 In August 2009, the State filed a separate complaint against Moller, once again charging her with one count of child abuse of M.J. The State then moved the court to join the case pertaining to C.M. with that pertaining to M.J. Over Moller's objection, the court approved joinder of the cases.

¶5 In January 2010, Moller obtained new defense counsel and in March 2010, the joined cases were tried before a jury. The jury ultimately found Moller not guilty of one charge of child abuse of C.M., but found her guilty of the remaining two charges of child abuse of C.M. and one count of child abuse of M.J.

Judgments of conviction were subsequently entered, after which Moller moved the court for postconviction relief. The circuit court denied Moller's motion. Moller appeals. Additional facts are discussed below.

DISCUSSION

¶6 On appeal, Moller challenges the joinder of the separate charges against her pertaining to C.M. and M.J. Moller also contends that she is entitled to a new trial because her trial counsel provided ineffective assistance. We address Moller's arguments in turn below.

A. Joinder

¶7 The joinder of crimes for purposes of trial is governed by WIS. STAT. § 971.12 (2011-12).[1] Section 971.12 provides in relevant part:

> (1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, … are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan….

Whether joinder is proper under § 971.12(1) presents a question of law, which we review de novo. *See* ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993).

¶8 Pursuant to WIS. STAT. § 971.12(1), joinder is permissible when two or more crimes "are of the same or similar character." To be of the same or

[1] The 2011-12 version of WIS. STAT. § 971.12 is identical to the version of the statute in effect at the time the crimes against Moller were joined. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

similar character: (1) the crimes must be the same type of offense occurring over a relatively short period of time; and (2) the evidence as to each crime must overlap. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). That the charges involve the same type of criminal charge, alone, is not sufficient under § 971.12. ***Id.***

¶9 Moller argues that the joined charges were not of the "same or similar character" because the time period between the charged offenses was not "relatively short" and because there was an insufficient overlap of evidence. *See* ***id.***

¶10 The time period between the charged offenses in this case is twenty-seven months. Moller acknowledges that cases have found time periods of fifteen to twenty months between joined offenses to be relatively short. She argues, however, that the time gap in this case cannot be considered relatively short because the evidence does not sufficiently overlap. Moller does not develop an argument separate from the evidentiary issue as to why the time between the joined offenses in this case was not relatively short. Accordingly, we will limit our review of whether joinder was proper under WIS. STAT. § 971.12 to Moller's claim that the evidence in this case did not sufficiently overlap.

¶11 We read Moller's brief as arguing that the evidence did not sufficiently overlap in this case because the circuit court initially determined that other acts evidence pertaining to other alleged victims was not admissible in the case pertaining to C.M. Moller seems to be arguing that the first determination on whether other acts evidence was admissible is final and that the circuit court could not change its mind on that matter. However, "[c]ircuit courts routinely revisit

their rulings during the pendency of a case ….” ***Town of Perry v. DSG Evergreen Family, LTD***, No. 2008AP163, unpublished slip op. ¶18 (WI App Apr. 23, 2009).

¶12 Moller also argues that the evidence does not sufficiently overlap in this case because: (1) the victims are different; (2) there are no common witnesses between the two cases; and (3) the only common connection between the offenses is the alleged offender. Moller ignores, however, the circuit court's ruling that the offenses were similar and that evidence as to each of the charged victims would be admissible other acts evidence concerning the other victim. Because Moller fails to explain how the extent of this overlap is insufficient, we do not address this argument further.

¶13 We read Moller's brief as arguing that even if joinder was proper under WIS. STAT. § 971.12, the circuit court should not have joined the offenses for trial because doing so was prejudicial to her.

¶14 If joinder of offenses satisfies the requirements of WIS. STAT. § 971.12, joinder of the offenses may nevertheless be improper if doing so would be prejudicial to the defendant. *See* ***State v. Nelson***, 146 Wis. 2d 442, 455-56, 432 N.W.2d 115 (Ct. App. 1988). Whether joinder that is otherwise proper under WIS. STAT. § 971.12 would be prejudicial to the defendant is a discretionary determination for the circuit court. *See* ***id.*** at 455. We review the court's decision on that issue for an erroneous exercise of discretion. ***Id.*** at 456.

¶15 If joinder is proper under WIS. STAT. § 971.12, it is presumed that the defendant would suffer no prejudice from the joinder. ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). To overcome this presumption, the defendant must show that he or she suffered a substantial prejudice. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982).

¶16 Moller argues that joinder was substantially prejudicial because the State was able to circumvent the circuit court's initial ruling on the admission of other acts evidence pertaining to other victims, including M.J., at the trial on the charges concerning C.M, which Moller claims is "patently unfair." Moller further argues that allowing the jury to hear about more than one victim was prejudicial because it "made it very likely that Moller would be convicted on the theory that if she abused one child, she probably abused the other."

¶17 Moller does not claim that she sought to sever the joined charges on the basis that they were substantially prejudicial. *See* WIS. STAT. § 971.12(3) (authorizing severance where the defendant will be "prejudiced by a joinder of crimes"). Nor does Moller argue that she otherwise raised the issue of prejudice before the circuit court or that she made a showing that she would suffer "substantial prejudice" as a result of joinder. Our own search of the record does not show that the issue of prejudice was raised before the circuit court. The court of appeals has neither duty nor resources to "'sift and glean'" the record for facts supporting a party's argument. ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (quoted source omitted). Because Moller has not demonstrated that the issue of substantial prejudice was raised before the circuit court, we conclude the issue has been forfeited. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

B. Ineffective Assistance of Counsel

¶18 Moller contends that she received ineffective assistance of counsel at trial. She claims that counsel was ineffective for: (1) failing to seek a continuance of the trial; (2) failing to raise various objections to the admission of evidence at

trial; (3) failing to seek a cautionary instruction for certain evidence; (4) failing to call certain witnesses at trial; and (5) failing to properly investigate.

¶19 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his or her attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, "[t]he 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 show either prong, the defendant's ineffective assistance of counsel claim fails. ***Id.*** at 697. We begin with the presumption that counsel has rendered adequate assistance. ***Id.*** at 689.

¶20 Whether counsel was ineffective presents a mixed question of fact and law. ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. We "will not reverse the [circuit] court's factual findings unless they are clearly erroneous," but review independently the issues of deficiency and prejudice. ***Id.***

1. Continuance

¶21 Prior to trial, Moller's attorney withdrew and new counsel was retained. Moller argues that her new counsel was ineffective for failing to seek a continuance of the trial. Moller argues that her new trial counsel acknowledged

that he did not have sufficient time to prepare for trial, but did not move for a continuance because Moller did not wish to continue the case.[2] We read Moller's brief as arguing that her trial counsel's failure to seek a continuance to prepare for the trial resulted in counsel submitting an incorrect jury instruction and counsel's failure to explain to the jury during closing arguments Moller's theory of defense. Even assuming for the sake of argument that counsel's failure to seek a continuance was deficient, Moller's claim fails because she does not explain why we should conclude counsel's failure to seek a continuance was the cause of any failure with respect to a jury instruction or closing argument. ***Strickland***, 466 U.S. at 694, 697.

2. DVD Interview of D.C.

¶22 At trial, D.C., whom Moller had also cared for at her home at the same time as C.M. but who was not an alleged victim of any of the charged crimes, was unable to remember how Moller treated C.M. The State then played for the jury a home-made DVD of D.C. responding to questions from his mother. On the DVD, D.C. was asked, among other things, how Moller behaved toward C.M. when C.M. cried and also how Moller reacted to D.C. when D.C. cried. At the request of his mother, D.C. demonstrated on the video that Moller pinched C.M.'s cheeks when C.M. cried; and in response to a question by his mother, D.C. stated that when he cried at Moller's house, he had to take a nap and "then [Moller] say balk, balk, and me say owie, owie, me tired in the house."

[2] In the argument section of Moller's brief-in-chief, counsel has almost entirely failed to provide this court with citations to the record to support her factual assertions, as required by WIS. STAT. RULE 809.19(1)(e). We remind counsel that this court does not have a duty to scour the record to review arguments unsupported by citations to the record. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

¶23 At trial, the prosecutor and Moller's trial counsel agreed that D.C.s video statement constituted a prior inconsistent statement in light of D.C.'s inability to remember how Moller treated C.M. while testifying at trial. The court disagreed and ruled that the DVD was admissible as a statement of recent perception pursuant to WIS. STAT. § 908.045.

¶24 Moller argues that her trial counsel was ineffective for failing to object to the admissibility of the DVD, or at a minimum, in failing to request that portions of the DVD pertaining to Moller's treatment of D.C. be redacted. As noted by the State, Moller does not specify what, if any, objections would have been suitable. Furthermore, Moller does not explain how or why, but for counsel's failure to object to the DVD or seek redaction of certain parts, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694.

3. Safe Harbor Video Recording

¶25 During trial, the prosecution showed the jury a recording of a Safe Harbor interview of M.J.'s older sister, A.J., during A.J.'s testimony at trial. In the recording, A.J. spoke about seeing and hearing Moller slam or bump C.M.'s head against the wall while Moller was changing C.M.'s diaper. A.J. also spoke about seeing Moller hurt another child, E.B., but later admitted that she never saw Moller hurt E.B. but instead thought she heard E.B.'s head hit the wall once while Moller was carrying E.B. A.J. also stated in the video that she had never observed any injuries on E.B., nor had she witnessed Moller harm any other children at her daycare.

¶26 Moller argues that her trial counsel was ineffective for failing to object to and seek a redaction of the statements A.J. made with respect to E.B. However, Moller has failed to show that, but for counsel's failure to object to

portions of the Safe Harbor interview, the result of the proceeding would have been different. We agree with the State that A.J.'s statements pertaining to E.B. were insubstantial and not damaging to the defense. A.J. acknowledged that she did not see Moller hit E.B.'s head on the wall, that she did not see any injuries on E.B, and that she did not see Moller hurt any other children besides C.M. That testimony was helpful, not harmful, to Moller and even as to matters that she did not recant on cross-examination, generally undermined the value of her testimony.

4. ***Haseltine***[3] Testimony

¶27 During trial, M.J.'s mother testified that she believed A.J. to be "very bright, articulate, smart, [and] a very mature girl" and that she had "absolutely no question that what [A.J.] was saying was … what she observed." In addition, the State's witness Dr. Vincent Fish, a psychologist with training in forensic child interviewing techniques, testified regarding A.J.'s report of abuse. Dr. Fish testified that A.J.'s report "doesn't detract from the credibility" and that the spontaneity of the report "mitigates against the possibility that somebody else thought there was abuse happening or somebody else wanted people to think that and pressured her to say that." Dr. Fish also testified that he did not find anything in A.J.'s interview to suggest that A.J. was suggestible or pressured by other people to report abuse at Moller's daycare.

¶28 Moller argues that her trial counsel was ineffective for failing to object to the testimony of M.J.'s mother and Dr. Fish on the basis that the testimony violated ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App.

[3] ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

1984). In ***Haseltine***, we held that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96. Moller argues the jury heard both A.J.'s mother and Dr. Fish attest to credibility of A.J., who Moller describes as "the State's paramount witness." Moller claims that her trial counsel's failure to raise a ***Haseltine*** objection cannot be considered harmless. However, aside from her conclusory assertion that the failure to raise a ***Haseltine*** objection was not harmless, Moller does not develop an argument that the failure to object was prejudicial. *See* ***Strickland***, 466 U.S. at 694, 697. For example, Moller does not discuss the larger evidentiary context and explain why the identified testimony is so significant in this context that it would have made a difference. Accordingly, we reject this argument.

5. Failure to Challenge Witness Testimony

¶29 Moller argues that her trial counsel performed deficiently when he failed to challenge at trial testimony by A.J. that she observed Moller bang C.M.'s head against the wall in an incident separate from that which occurred while Moller was changing C.M.'s diaper, in spite of A.J.'s statement in the Safe Harbor recording that the only harm she observed Moller cause to C.M. occurred while Moller was changing C.M.'s diaper. The State responds that Moller's trial attorney stipulated that he "made the strategic decision not to make a string of objections before the jury to testimony recounting statements made by [A.J.] and other child witnesses because the objections would have been overruled by the Court and would have underlined the importance of these statements to the jury." Moller, in turn, responds that the stipulation demonstrates that trial counsel did not in fact make a strategic decision not to impeach A.J. Moller also argues that counsel's decision not to challenge A.J.'s testimony cannot be considered a

reasonable strategy decision because counsel failed to give any reason for failing to impeach A.J. and counsel mistakenly thought there was an acquittal of the relevant charge. However, Moller has not provided any factual or legal support for this claim.

¶30 Furthermore, even assuming for the sake of argument that trial counsel deficiently failed to challenge testimony by A.J. that she observed Moller bang C.M.'s head against the wall other than while at the changing table, Moller has not shown that counsel's failure to do so was prejudicial. Moller asserts that had her trial counsel impeached A.J. with regard to that testimony, it is "likely" or "highly possible" that the jury would have acquitted her on the second count pertaining to C.M. Moller does not, however, develop an argument as to *why* acquittal on that charge would have been likely. Moreover, as observed by the circuit court, A.J. was subject to impeachment because the jury was shown evidence of A.J.'s inconsistent statements.

6. Other Acts and Hearsay Objections

¶31 Moller argues that her trial counsel was ineffective for failing to object at trial to the admission of other acts and hearsay evidence. Moller does not specify what other acts or hearsay evidence she is referring to. *See* ***Tam,*** 154 Wis. 2d at 291 (appellate court has no obligation to scour the record for facts supporting a party's argument). Furthermore, although Moller argues that her trial counsel's failure to raise other acts and hearsay objections was "highly prejudicial" in that the circuit court would not have given the State so much "leeway" had her trial counsel raised those objections and likely would have sustained any hearsay objections, Moller's assertions are at most speculative. A

claim of ineffective assistance of counsel may not be based on speculation. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

7. Failure to Request a Cautionary Instruction

¶32 Moller argues that her trial counsel was ineffective for failing to request a cautionary jury instruction on the use of other acts evidence.

¶33 Trial counsel stipulated that he chose not to request a limiting instruction so as not to bring "further attention to those acts" and to "avoid further highlighting those other acts in a separate instruction." The circuit court found that counsel's failure to request a limiting instruction was a "reasonable trial strategy." Moller concedes that her trial counsel's decision was strategic, but asserts that it was not reasonable. Once again, however, Moller's argument is conclusory and we reject it on that basis.

8. Failure to Call Certain Witnesses

¶34 Moller argues that her trial counsel was ineffective for failing to call a witness at trial to testify regarding the menu Moller planned for September 17, 2008, the date that count three with respect to C.M. was alleged to have occurred. Evidence was presented at trial that on that date, C.M. was eating toast at the time abuse occurred. Moller argues that the witness would have established that although the investigating detective was informed that the abuse occurred while toast was being consumed, toast was not on the menu that day. Moller does not identify who this "witness" is, nor does she show that the result as to the outcome of the trial would have differed had someone testified regarding the menu. Moller's argument presupposes that preselected menu items are binding and that no modifications to a menu could take place.

CONCLUSION

¶35 For the reasons discussed above, we conclude that Moller has not established that joinder was improper under WIS. STAT. § 971.12 or otherwise prejudicial to her. We further conclude that Moller has not established that she received ineffective assistance of counsel at trial. Accordingly, we affirm.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.