COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2193-CR **Cir. Ct. No. 2011CF3841**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONTGOMERY EDWARD WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and JEFFREY A. WAGNER, Judges.[1] *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

[1] The Honorable Rebecca Dallet presided over the jury trial. The Honorable Jeffrey Wagner presided over Walker's postconviction motion.

¶1 PER CURIAM. Montgomery Walker appeals a judgment of conviction for first-degree sexual assault (intercourse) of a child under twelve, and an order denying postconviction relief. Walker argues his trial counsel did not properly inform him of the definition of sexual intercourse prior to trial, and but for counsel's alleged errors he would have accepted the State's offer to plead to second-degree sexual assault of a child, which lacked the mandatory minimum twenty-five years' initial incarceration. Walker also claims the circuit court erred by denying counsel's motion to withdraw. We reject Walker's arguments and affirm.

¶2 According to the criminal complaint, Walker's eight-year-old granddaughter was in her bedroom watching a movie and coloring when Walker came into her room, took her by the hand, and led her into the laundry room. Walker then took off her pants and underwear and carried her into the bathroom where he placed her on the sink and told her to open her legs. The granddaughter told police that Walker then "put his privacy" (identified as his penis) "into her privacy" (identified as her vagina). Walker later returned to her room and motioned to her to follow him. He took her by the arm, led her to the bathroom where he removed her pants and underwear, and again "put his privacy into her privacy."

¶3 A DNA report concluded semen found on two spots on the victim's underwear matched Walker's DNA. Walker claimed innocence and indicated to the circuit court that he intended to present an alibi defense. Walker stated he wanted a lawyer to take his case to trial. Walker subsequently asked the court to allow his trial counsel to withdraw as he did not think counsel supported him in presenting his innocence claim. The court rejected his argument.

¶4 At trial, Walker presented a defense in which he denied sexually assaulting the victim and he presented an explanation regarding how his semen came to be on the victim's underwear. Walker's wife testified that she heard Walker tell the victim to go to bed and she heard the victim stomp down the hallway and slam the door. Walker's wife further testified Walker got into bed with her and she was aware that he was sleeping next to her until 6 a.m. She claimed to be aware of where Walker was during the entire time and that he had no contact with the victim.

¶5 Walker's wife also testified that she and Walker had sex the day before the assault. She wiped semen off herself with a sanitary pad and threw it in the wastebasket in the bathroom. She testified her granddaughter had the habit of playing in the bathroom garbage. Walker similarly testified that he had sex with his wife the day prior to the assault and believed the victim's mother set him up. Walker believed the victim or her mother wiped his semen from his wife's sanitary pad onto the victim's underwear.

¶6 On the first day of trial, the prosecutor and defense counsel twice put on the record an offer for Walker to plead guilty to second-degree sexual assault of a child. The first discussion occurred before the parties began picking a jury. The second occasion was during a break from voir dire. During this colloquy, the prosecutor included a recommendation for four to six years of incarceration. Walker specifically rejected this offer. The parties completed voir dire and selected the jury, after which the court took a short break for the parties to review the preliminary instructions. Following that break, the court instructed the jury on the definition of sexual intercourse.

¶7 Following his conviction, Walker filed a postconviction motion claiming ineffective assistance of counsel for failing to inform him the State did not have to prove that Walker ejaculated semen into the victim to convict him of sexual assault of a child. Walker claimed he had not understood the weakness of his case, and he would have accepted the State's plea deal had he known that sexual intercourse did not require evidence of his sperm inside the victim's vagina. He also claimed he did not understand the State could prove sexual intercourse without evidence of full insertion and repeated thrusting of an adult penis. The circuit court denied Walker's ineffective assistance of counsel claim. Walker now appeals.

¶8 If a defendant claims the actions of counsel rendered his plea unknowing and involuntary, the defendant must establish deficient performance of counsel and that counsel's actions prejudiced the decision whether to plead guilty or go to trial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). At the outset, the defendant must allege facts to show "that there is a reasonable probability that, but for the counsel's errors, he [or she] would … have pleaded guilty and would [not] have insisted on going to trial." ***Id.*** at 312 (citation omitted).

¶9 A defendant must do more than merely allege he would have pled differently. He must include factual assertions indicating why he would have changed his plea absent his attorney's deficient performance. This may include indicating special circumstances that might support the conclusion that the defendant placed particular emphasis on the information the attorney failed to impart in deciding whether or not to plead guilty. ***Id.*** at 313, 317.

¶10 Walker failed to allege objectively legitimate factual assertions indicating why he would have chosen the plea deal absent his attorney's allegedly deficient performance. Rather, the record conclusively demonstrates Walker would have proceeded to trial and continued to claim his innocence whether or not counsel informed him that sexual intercourse did not require penetration or the emission of semen.

¶11 As the circuit court observed, Walker insisted on his innocence and testified at trial that he "never came near" the victim. Walker also knew well before trial that in addition to the victim's testimony, the State's key evidence was his semen on the victim's underwear. Walker obviously believed the jury would accept his wife's alibi testimony that he was in bed with her all evening and the victim or her mother had wiped his semen onto the victim's underwear. However, the jury found his story of a conspiracy between the victim and her mother was not credible.

¶12 In addition, the record reveals the plea negotiations continued well into jury selection. In the middle of that process, Walker specifically rejected the State's offer to plead guilty to second-degree sexual assault of a child. Very soon after Walker's rejection of the plea offer and before opening statements, the circuit court instructed the jury in Walker's presence concerning the definition of sexual intercourse. The court stated, "'Sexual intercourse' means any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another." The court also specifically stated that "[e]mission of semen is not required." If those factors had been critical for Walker, he certainly had opportunities to attempt to resurrect the recently rejected plea offer, but Walker made no such attempts. He continued his claim of innocence. In fact, Walker continued to claim innocence all the way through sentencing.

¶13 In the end, Walker got what he wanted: a trial. He insisted on his innocence in spite of the favorable plea deal and the overwhelming evidence of his guilt. Quite simply, Walker took his chance with the jury and lost. Although he now seeks to reinstate the plea offer with the benefit of hindsight, Walker fails to demonstrate a reasonable probability he would have accepted the plea offer but for counsel's alleged errors, and he has therefore failed to show prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Because Walker makes an insufficient showing of prejudice, we need not address whether counsel's performance was deficient. ***Id.*** at 697.

¶14 Walker also argues the circuit court erroneously exercised its discretion by denying the motion to withdraw. *See* ***State v. Jones***, 2010 WI 72, ¶4, 326 Wis. 2d 380, 797 N.W.2d 378. In ***Jones***, the court stated a defendant is not guaranteed a "'friendly and happy attorney-client relationship,' but rather effective assistance of counsel." ***Id.*** (citation omitted).

¶15 Here, the circuit court considered relevant factors, including Walker's stated reasons for requesting new counsel, and the court's inquiry was certainly adequate. *See* ***id.***, ¶31. The court also considered the timeliness of the request. *See* ***id.***, ¶32. Walker insists it was unreasonable for the court to deny the request to withdraw because it was Walker's first request for substitution of counsel and the public defender's policy would have allowed appointment of a second trial attorney. However, our supreme court recently rejected that same argument in ***Jones***. *See* ***id.***, ¶4.

¶16 The circuit court also considered "'whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a *total* lack of communication that prevented an adequate defense and frustrated a fair

presentation of the case.'" ***Id.***, ¶33 (emphasis added, citation omitted). The court found that Walker failed to present any information that he and counsel had reached an irreconcilable point in their relationship. The court determined that the personality clashes between Walker and counsel did not impede counsel's ability to effectively represent Walker.

¶17 The court concluded, "The frustration that I see is not a frustration with a lawyer who is unwilling to talk to you, communicate with you, and advocate for you." In reaching that conclusion, the circuit court noted Walker and counsel talked to each other during the proceedings, and had spoken via telephone. The court also inquired concerning Walker's contention that counsel "hasn't even spoken with my own witness in this case since this case started." The following exchange occurred:

> THE COURT: Are there witnesses yet to talk to?
>
> [DEFENSE COUNSEL]: I'm not sure which witness he's talking about, but I have talked to –
>
> THE DEFENDANT: There's only one, Your Honor.
>
> THE COURT: Who is that?
>
> [THE DEFENDANT]: My wife.
>
> THE COURT: Have you talked to Mr. Walker's wife?
>
> [DEFENSE COUNSEL]: I have, and I have written communication from her. It's not true what Mr. Walker is saying.
>
> THE COURT: I didn't think it was. Didn't sound like it.

The court asked counsel if he could think of anything that another lawyer could do in this case that counsel was not able to do, and counsel responded, "Not at the moment."

¶18 The court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.***, ¶23. The court properly exercised its discretion in denying the motion to withdraw.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).