COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP460-CR **Cir. Ct. No. 2012CF133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK TYRONE WHITEHEAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Frank Whitehead appeals a judgment convicting him of one count of first-degree sexual assault of a child and one count of threats to injure or accuse of a crime. He also appeals an order denying postconviction

relief. Whitehead argues his trial attorney was ineffective. In the alternative, he seeks a new trial in the interest of justice. We reject these arguments and affirm.

BACKGROUND

¶2 Whitehead was accused of sexually assaulting T.S. in early January 2012, when she was eleven years old. Whitehead maintained his innocence, and the case went to trial in August 2012. At trial, defense counsel's strategy was to highlight inconsistencies in T.S.'s testimony and to show that T.S. and her mother, M.S., had changed their stories about the assault throughout the course of the investigation.

¶3 T.S. testified at trial that Whitehead was one of her neighbors, and she occasionally went to his house to play with his stepsons or earn extra money by doing chores. On the day of the assault, T.S. testified she and her younger brother, S.S., walked to Whitehead's house. When they arrived, Whitehead was the only person home. Whitehead told T.S. and S.S. his stepsons had gotten new bicycles, and he asked whether they would like to buy the boys' old bicycles. S.S. then went to Whitehead's shed and picked out a bike. Whitehead suggested that S.S. ride the bike home and ask his mother to come back and pay for it. Whitehead asked T.S. to come inside and do some housework for him.

¶4 T.S. testified S.S. rode his bike home, and she went inside with Whitehead. Once inside, Whitehead forced her down onto a bed, performed oral sex on her, and then forced her to touch his testicles. T.S. managed to get away from Whitehead, and she ran out of the house. As she was leaving, Whitehead threatened to make T.S. or her family "disappear" if she told anyone about the assault.

¶5 T.S. testified she washed her hands when she arrived home from Whitehead's house and sat in front of the computer for a few minutes. Her mother then told her to get into the family's van so they could go to Whitehead's house to pay for S.S.'s bike. T.S. and her mother rode to Whitehead's house in the van, and S.S. rode his bike. T.S. testified she remained in the van once they reached Whitehead's house. Her mother picked out a bike for her and put it in the trunk. Whitehead told T.S.'s mother that T.S. could earn back the money paid for the bike by doing chores for him. When T.S.'s mother relayed that offer to T.S., T.S. said she needed to go home, and she later made excuses not to go back to Whitehead's house.

¶6 On cross-examination, T.S. confirmed her mother had told her never to be alone with Whitehead, but she stated she was told that after Whitehead assaulted her. When asked why her mother told her not to be alone with Whitehead, T.S. stated, "I just kept asking [C.S., T.S.'s older sister], why don't you want to baby-sit [Whitehead's stepsons]? And she said she doesn't want to be near Frank anymore." T.S. later conceded she told investigators shortly after reporting the assault that she had known Whitehead for three years and "the second year [C.S.] said that he tried to have sex with her, and I really didn't believe it because I thought Frank was a nice guy and everything, but then the third year he tried with me[.]"

¶7 T.S.'s mother, M.S., was the next witness to testify at trial. M.S. testified that, one day during the previous winter, S.S. rode home on a bike from Whitehead's house, but it was "rusty" and "look[ed] beat up[.]" M.S. told S.S. he should go back to Whitehead's house and pick out a different bike. M.S. then drove to Whitehead's house with T.S. S.S. picked out a different bike, and Whitehead found a bike he thought T.S. would like. M.S. paid Whitehead $20 for

both bikes. Although she was uncertain, M.S. testified she believed T.S. stayed in the van during the transaction. M.S. testified T.S. did not tell her about the assault until the evening of April 10, 2012. M.S. reported the assault to police the following morning.

¶8 On cross-examination, M.S. admitted typing a statement shortly before the assault was reported to police, in which she stated she had driven to Whitehead's house with both children on the day of the assault and they each picked out a bike. When asked whether that statement was wrong, M.S. responded, "I was still kind of in shock when I wrote that." Defense counsel then asked M.S. whether she had driven T.S. home after purchasing the bikes, and M.S. responded:

> I don't remember if she was in the van or if she rode the bike. To be honest, I had thought that she had stayed behind. Because I remember Frank asked her to help him with something. I remember that specifically. But I guess she told him that she had some chores to do and couldn't help him with whatever he needed help with.

¶9 Defense counsel next asked M.S. about an incident that happened at the Black Bear Casino in Carlton County, Minnesota, about a year before the alleged assault on T.S. M.S. stated that, after a birthday party at the casino for one of Whitehead's stepsons, M.S.'s older daughter, C.S., reported that Whitehead had "tried to mess with her or tried something with her[.]" After that incident, M.S. told T.S. she should never be alone with Whitehead, but she did not tell T.S. why. M.S. explained, "I have three daughters. And one of them is of legal age. So while what Frank did was extremely inappropriate, it would not be an illegal action. I thought he had their ages confused."

¶10 Defense counsel then confronted M.S. with her testimony from the May 9, 2012 preliminary hearing. During the preliminary hearing, M.S. testified that, after she paid for the bikes, S.S. rode his bike home immediately, and T.S. "parked hers next to the shed" and "brought it home later because she stayed [at Whitehead's house]." Defense counsel asked M.S., "So on the day that you purchased the bikes … you drove off, leaving your … 11-year-old daughter, behind, presumably to do chores for Frank with nobody there; is that right?" M.S. responded, "I was mistaken. She went home with me. The [assault] actually occurred before we bought the bikes." Defense counsel then asked, "So when you testified under oath [at the preliminary hearing] that you did leave her there because Frank asked about her doing some chores, now you're saying that that didn't happen and you were wrong?" M.S. responded, "That's exactly what I'm saying. I remembered … it inaccurately."

¶11 Finally, defense counsel confronted M.S. with testimony she gave during a restraining order hearing involving Whitehead. During that hearing, the court commissioner asked M.S. why she would have left T.S. alone at Whitehead's house after purchasing the bikes when she knew C.S. had previously accused Whitehead of sexual assault. M.S. responded she was unaware at the time that Whitehead was the only person in the house. The court commissioner retorted, "But you didn't know if anybody else was in the house." M.S. replied, "I was assuming that [T.S.] was going to be helping him with something outside because I had told her I did not want her going in the house with him alone or in a car alone."

¶12 On redirect examination, the prosecutor asked M.S. whether she had an independent memory about what she testified to at the preliminary hearing as opposed to the restraining order hearing. M.S. responded she remembered getting

into an argument with Whitehead during the restraining order hearing, during which Whitehead accused her of threatening to get even with him and calling him an "F'ing N word[.]"

¶13 Whitehead was the only defense witness. He testified M.S. drove to his house with T.S. and S.S. on either the first or second Saturday of January 2012. He was standing next to his car when M.S. pulled up and asked if he still had bikes for sale. Whitehead said he did, and they went to the shed where the bikes were stored. After the children picked out bikes, M.S. paid him $20 and then drove away. T.S. and S.S. rode away on their bikes. Whitehead denied asking T.S. to stay at his house to do chores. He also testified T.S. and S.S. had not been at his house at any other time on the day in question. He denied sexually assaulting T.S.

¶14 The jury found Whitehead guilty of both charges. Whitehead moved for postconviction relief, asserting ineffective assistance of trial counsel. He also sought a new trial in the interest of justice. The circuit court denied Whitehead's motion, following a ***Machner*** hearing.[1] Whitehead now appeals.

DISCUSSION

I. Ineffective assistance

¶15 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶16 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

¶17 On appeal, Whitehead argues his trial attorney was ineffective in three respects.[2] First, he argues his attorney should have questioned him at trial about the fact that M.S. threatened him during a phone call approximately one week before he was accused of sexually assaulting T.S. During the ***Machner*** hearing, Whitehead testified M.S. called him about one week before he was accused, threatened to "get" him, and referred to his stepsons using a racial slur. Whitehead's trial attorney confirmed he was aware of the telephone call before trial. However, he testified he did not ask M.S. about the call during trial because

[2] In his postconviction motion, Whitehead also argued his trial attorney was ineffective for a fourth reason. However, Whitehead does not renew that argument on appeal, and we therefore deem it abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.").

he was confident she would deny it, and he felt Whitehead's testimony about the call would be more effective without a prior denial by M.S. Postconviction counsel then noted trial counsel did not actually ask Whitehead about the phone call during trial. Trial counsel responded, "My recollection is that I did. … If that question was not asked him during the trial, that would have been a mistake, yes."

¶18 In fact, trial counsel did not question Whitehead about the phone call during trial. Whitehead argues this amounts to ineffective assistance because, had the jury heard that M.S. threatened to "get" Whitehead shortly before the assault was reported to police, there is a reasonable probability it would have concluded the assault allegation was fabricated.

¶19 Assuming, without deciding, that Whitehead's attorney performed deficiently, we conclude Whitehead has failed to show that counsel's error prejudiced his defense. The problem with Whitehead's argument is that testimony about the alleged threat came into evidence during the State's redirect examination of M.S. Specifically, M.S. testified Whitehead claimed during the restraining order hearing that she had threatened to get even with him and had called him an "F'ing N word[.]" Thus, contrary to Whitehead's assertion, the jury was aware of the alleged threat. As a result, it is not reasonably probable the result of Whitehead's trial would have been different had counsel asked Whitehead about the phone call. *See* ***Strickland***, 466 U.S. at 694.

¶20 In his reply brief, Whitehead notes that M.S. incorrectly testified the racial slur was directed at Whitehead, rather than his stepsons. He also asserts he would have testified about the timing of M.S.'s threat and its proximity to the charges against him. However, Whitehead does not explain why trial counsel's

failure to elicit this additional information was prejudicial. The jury was aware the threat was made to Whitehead, regardless of the target of any racial slurs. Testimony about the timing of the threat may have been of added probative value, but it was not determinative. We are not satisfied the outcome of the trial would have been different had the jury been specifically advised the threat to "get" Whitehead was made a week prior to charges being filed, rather than at some other time.

¶21 Whitehead next argues his trial attorney was ineffective by failing to introduce a Douglas County Sheriff's Department report stating the Carlton County Sheriff's Department had investigated the allegation that Whitehead sexually assaulted C.S., and "[i]t appears that they are closing their case without further action." Whitehead argues this report would have mitigated T.S.'s and M.S.'s "very damaging testimony" that Whitehead was accused of sexually assaulting C.S.

¶22 Even if trial counsel's failure to introduce the sheriff's department report constituted deficient performance, we conclude it did not prejudice Whitehead's defense. During trial, Whitehead testified he had previously been convicted of twenty crimes, and he listed the year and offense for each conviction. He did not list any convictions for sexual assault. Thus, despite trial counsel's failure to introduce the sheriff's department report, the jury knew Whitehead had not been convicted of sexual assault in connection with C.S.'s allegations. Moreover, the sheriff's department report did not definitively state Whitehead did not assault C.S. It merely stated, without further elaboration, that the investigating agency "appear[ed]" to be closing the case without further action. Introducing the sheriff's department report would not have added anything to Whitehead's defense. Consequently, it is not reasonably probable the result of Whitehead's

trial would have been different had trial counsel introduced the report. *See* ***Strickland***, 466 U.S. at 694.

¶23 Whitehead next argues trial counsel should have called T.S.'s brother, S.S., to testify at trial. S.S. was nine years old at the time of the assault. During the ***Machner*** hearing approximately two years later, he testified he and T.S. went to Whitehead's house multiple times on the day of the assault. The first time, they went there to play with one of Whitehead's stepsons. The second time, they each picked out a bicycle. After they picked out their bicycles, S.S. rode his bike home to tell M.S. to pay Whitehead for the bikes, and T.S. stayed behind at Whitehead's house. M.S. and S.S. later returned to Whitehead's house to pay for the bikes. S.S. then rode his bike home. He testified T.S. rode her bike "a little," but she ultimately put it in the trunk of the van and rode home with M.S.

¶24 Again, we conclude Whitehead has failed to show he was prejudiced by trial counsel's performance. Whitehead argues S.S.'s testimony is significant because it "directly contradicts that of [T.S.] at trial when she told the jury that she had not gotten out of the van when they went to Whitehead's house and that she did not pick out a bike in the shed with her brother." However, despite these minor discrepancies, S.S.'s testimony actually corroborates T.S.'s testimony in two important respects. First, both children testified they went to Whitehead's home multiple times on the day of the assault, contrary to Whitehead's testimony that they were there only once. Second, both children testified S.S. rode his bike home and left T.S. alone with Whitehead, contrary to Whitehead's testimony that he was not alone with T.S. on the day in question.

¶25 Because S.S.'s testimony corroborates important aspects of T.S.'s testimony, calling S.S. as a witness at trial would not likely have helped

Whitehead's defense, and it may have helped the prosecution. Moreover, given the ages of the children, and the time that elapsed between the assault and Whitehead's trial, it is unlikely a jury would have found the minor discrepancies between T.S.'s and S.S.'s testimony significant. Thus, it is not reasonably probable the result of the trial would have been different had Whitehead's attorney called S.S. as a witness. *See* ***Strickland***, 466 U.S. at 694.

¶26 Finally, Whitehead argues he has established ineffective assistance based on the cumulative prejudice caused by trial counsel's alleged errors. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. We are not persuaded. The majority of the evidence Whitehead argues should have been introduced but for his trial counsel's deficient performance was considered by the jury and did not affect the outcome of the trial. In addition, the jury was well informed about the inconsistencies in the testimony of T.S. and M.S. concerning the timing of the assault and Whitehead's opportunity to commit it. The jury was also aware that T.S.'s trial testimony about her knowledge of the alleged assault on C.S. contradicted a previous statement she made to investigators. Given this evidence, trial counsel's failure to call S.S. to provide minimal evidence of additional inconsistencies about the timing of the events on the day of the assault does not undermine our confidence in the outcome of Whitehead's trial. *See* ***Strickland***, 466 U.S. at 694. We therefore reject Whitehead's ineffective assistance claim.

II. New trial in the interest of justice

¶27 In the alternative, Whitehead seeks a new trial in the interest of justice. Under WIS. STAT. § 752.35,[3] we may grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" "Our discretionary reversal power is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We grant a new trial in the interest of justice "only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (quoted source omitted).

¶28 Whitehead argues justice has miscarried due to the alleged errors of trial counsel discussed above. He does not, however, develop any additional argument supporting his claim for a new trial, beyond those arguments advanced in support of his ineffective assistance claim. Whitehead may not obtain a new trial in the interest of justice simply by rehashing arguments we have already rejected. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) ("We have found each of [the defendant's] arguments to be without substance. Adding them together adds nothing. Zero plus zero equals zero.").

¶29 Moreover, to obtain discretionary reversal based on a miscarriage of justice, Whitehead must convince us there is a substantial probability a new trial would produce a different result. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998). However, we have already determined under

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the ***Strickland*** analysis that it is not reasonably probable the result of Whitehead's trial would have been different absent counsel's alleged errors. *See* ***Strickland***, 466 U.S. at 694. The State argues that, having failed to show a reasonable probability of a different result under the ***Strickland*** analysis, Whitehead cannot show a substantial probability of a different result, based on the same alleged errors, under the miscarriage of justice test. Although the State does not cite any authority in support of this proposition, we find its analysis persuasive. In addition, Whitehead fails to respond to the State's argument in his reply brief, and it is therefore deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, we decline Whitehead's request for a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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