COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP526-CR **Cir. Ct. No. 2011CF16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES M. NORQUAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: THOMAS J. VALE, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. James Norquay appeals a judgment following a jury trial for second-degree sexual assault of a child, three counts of sexual assault of a child by a foster parent, and two counts of incest with a child. Norquay also challenges the denial of his postconviction motion. He argues ineffective

assistance of trial counsel, and also seeks a new trial in the interest of justice. We reject his arguments and affirm.

¶2 This matter arises out of allegations of sexual assault made by a foster child. The child was placed in the Norquays' home by Lafayette County Human Services on November 6, 2008. The placement was troubled from the start, but Norquay and his wife Lori eventually adopted the child on November 17, 2009.

¶3 The child was removed from the home following an incident on January 2, 2010. Norquay's wife Lori had purchased a pink Playboy shirt for herself, prompting a temper tantrum by the child, who felt she should also have been allowed one. After Lori called 911, the child made comments such as, "[Y]ou don't even know what dad and I are doing." When police arrived, an officer heard the child say as she passed Norquay and went into her room, "Just tell them the truth, dad." When questioned by police, the child stated that she was in a sexual relationship with Norquay.

¶4 The child claimed that the last sexual incident occurred on December 25, 2009, when she and Norquay were working in the alpaca shed and "sex happened, not penis to vagina sex, but I was touching him, and then there was … ejaculation on my hand, and I wiped it on my overalls." A search warrant retrieved coveralls with visible semen stains. DNA analysis determined that Norquay was the source of the semen, although Norquay's wife insisted that the semen was planted by the victim.

¶5 The victim recounted numerous other specific sexual incidents involving penetration with finger and penis, masturbation, and oral sex. She also recounted details of Norquay's body and sexual preferences, including Norquay's

predilection for nipple stimulation, and thong or G-string underwear. She also stated that Norquay had two tattoos, including one on his lower pelvic region. Another notable detail was that Norquay shaved his pelvic area.

¶6 An exchange of e-mails occurred between the victim and Norquay on October 2, 2009. Among other things, the victim wrote, "im still have jumbled feelings im sure you do to [sic]" and "[I] really just want you to JUST be my dad thats it … no more no less." The last sentence of the last e-mail from Norquay states: "Will you please delete these e-mails and then delete them from your deleted items?"

¶7 Following a five-day trial, Norquay was convicted of one count of second-degree sexual assault of a child, three counts of sexual assault of a child by a foster parent, and two counts of incest with a child. The circuit court sentenced Norquay to twenty years of initial confinement and fifteen years of extended supervision on each count, concurrent.

¶8 Norquay sought postconviction relief, alleging ineffective assistance of trial counsel. On appeal, Norquay repeats and pursues the following three allegations: (1) counsel's failure to question Norquay's wife concerning a December statement which allegedly made the victim feel threatened in her position within the household; (2) counsel's failure to ensure compliance with a subpoena concerning a friend of the victim's; and (3) counsel's failure to put into context events surrounding the October 2 e-mails. Norquay also argued that he was entitled to a new trial in the interest of justice. Following an evidentiary hearing, the court denied the motion, and Norquay now appeals.

¶9 To prove a claim of ineffective assistance of counsel, the defendant has the burden of proving both that his trial counsel performed deficiently and that

the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Prejudice requires showing that counsel made errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[1] ***Id.*** Assuming, without deciding, that trial counsel performed deficiently, we nevertheless conclude that the defense was not prejudiced.

¶10 As to the first allegation, Norquay insists that trial counsel was ineffective for failing to present evidence of the "serious threat" to the victim by Norquay's wife Lori, within the month before the child's accusations, that Lori could put the victim "back into the system." Norquay argues that Lori's threat "was one of the types of triggers that could have stressed [the victim], made her believe she was being badly treated, … and therefore could have helped explain the timing of the false accusations." Norquay alleges this failure was prejudicial because it "denied the jury an explanation for why [the victim] would seek ahead of time to bolster her false claims with planted physical evidence." According to Norquay, Lori's threat supplied a motive—"the specter of going back into the foster system was enough of a threat to spark planting of DNA and, when coupled with Lori's calling of the police, was enough to cause [the victim] to make false accusations."

¶11 The victim in this case had a history of lies and prior false allegations of sexual assault, and that was made a centerpiece of Norquay's trial. The jury learned that the victim often lied from numerous witnesses, including, but not limited to, social service professionals, police investigators, the victim's foster

[1] Norquay argues: "The correct focus is on the evidence viewed most favorably to the defendant, not to the state." In this regard, Norquay cites ***Neder v. United States***, 527 U.S. 1, 19 (1999). We disagree that ***Neder*** states that proposition.

mother after the victim left the Norquays, the victim's own lawyer, and the victim herself.

¶12 However, the evidence against Norquay was overwhelming despite the victim's credibility problems. The evidence of Lori's threat to place the victim "back into the system" would not overcome the other evidence against Norquay. Most notably, additional impeachment evidence would not undermine the DNA evidence or Norquay's instruction to delete the incriminating e-mails. It also would not explain the victim's knowledge of Norquay's tattoos, shaved groin, and penchant concerning nipple stimulation and thong underwear, allegations that were otherwise corroborated at trial. Accordingly, we conclude that Norquay was not prejudiced by the failure to present evidence of Lori's threat to place the victim "back into the system."

¶13 As to the second allegation, Norquay argues that defense counsel unreasonably failed to compel the appearance of K.H., a friend of the victim's since elementary school. Although K.H. received a subpoena to appear at trial and testify, an attachment indicated that "[t]he time you will testify is somewhat uncertain …. I will try to let you know as soon as I can when you might be called to testify." K.H. understood that someone would contact her to appear and, when no one did, she "didn't know I was supposed to" appear at trial. However, the parties entered into a joint stipulation stating that the victim told K.H. that she had a baby son named Gunner and "gave a scrapbook to [K.H.] that contained photographs of [the victim] and Gunner."

¶14 K.H. testified at the postconviction hearing that the victim told her that she had a ten-month-old son named Gunner and that her foster mother cared for Gunner while the victim was at school. K.H. testified that the victim told her

that Gunner's father was "Josh," whom she said was in the military. K.H. was shown a scrapbook with photos that supposedly depicted the victim and Gunner together. K.H. was shocked when Wisconsin Department of Justice special agents told her that "[the victim] had never been pregnant before and that Gunner did not exist as her son."

¶15 Norquay argues that the stipulation was "far weaker than [K.H.'s] testimony would have been." Norquay also asserts that K.H.'s testimony "would have demonstrated [the victim's] ability to create physical evidence to support her lies, which would have directly strengthened the theory of the case and indirectly increased the possibility that, as Lori believed, [the victim] manipulated the DNA evidence onto her coveralls."

¶16 Again, we are unpersuaded. As the circuit court properly observed, the jury heard plenty of testimony about the victim's tall tales. In fact, the victim told the Gunner story herself at trial. The jury also heard from the victim's own mouth other admittedly false stories of pregnancies and miscarriages. The victim's foster mother for eighteen months after the victim left the Norquays also told the jury about the victim's false stories of pregnancies and miscarriages. K.H.'s testimony would therefore have been largely cumulative.

¶17 Aside from being cumulative, K.H.'s testimony would also have been potentially damaging to the defense. An investigative report from the Wisconsin Division of Criminal Investigation indicated that K.H. provided the following information:

> Eventually, James showed interest in [the victim] and started grabbing and kissing [her]. At first, [the victim] was disgusted …. [She] felt as if James was forcing her to have sex, because he continuously told [her] she was going to be part of the family.

> [K.H.] stated that [the victim] told her that she and James had sex in the house and also in the barn on top of the hay … [including] penis to vagina and oral … sex.
>
> [The victim] told her that James would try to make it romantic, calling [the victim] his lover and telling her that the two would eventually have a family together. After they had sex, James would blame [the victim]. He would tell her that they only had sex because she made him, and that it was all her fault.
>
> [K.H.] said that [the victim] told her she did not like having sex with James. In fact, [the victim] was angry that Lori had not been suspicious of all the time James and [the victim] spent together. [The victim] said that James held her hand in public, even when [Lori] told him to stop.

¶18 Moreover, the addition of K.H.'s trial testimony would not have increased the believability of the farfetched allegation that the victim planted semen evidence on her coveralls. Norquay's wife Lori testified that the victim could hear, through the vent connecting their bedrooms, Lori and Norquay having sex, and therefore would have known details of Norquay's body and sexual preferences, such as his preference "to have his nipples stimulated." However, Lori never explained how the victim would know that the couple discarded tissue containing Norquay's postcoital semen. For that matter, the proposition that the victim would choose coveralls as a place to plant the semen is more than odd, when an intimate article of clothing such as underwear is a far more obvious place for incriminating physical evidence such as semen.

¶19 The circuit court correctly recognized the farfetched nature of the defense suggestion that the victim planted the semen evidence. The court stated: "She would have had to plan that ahead of time to plant the DNA evidence." The DNA would have had to have been planted before January 2 (the day she had the outburst which caused Lori to call 911 that led to the victim's removal from the home and the police seizure of the coveralls). As a result, the timing of the theory

of planted DNA evidence only works if the victim could predict that Lori would call 911. The jury was entitled to reject this elaborate theory.

¶20 As to the third allegation, Norquay argues that trial counsel was ineffective by failing to "investigate and to present events which helped explain the emails of October 2, 2009." The victim explained the e-mails at trial, stating that they concerned "[t]he whole sex thing." She also testified at trial as to their meaning: "I don't want to have sex no more. I don't want to be his sex partner. I don't want to do that anymore."

¶21 Norquay insists that defense counsel failed to provide the jury with an innocent context for the October 2009 e-mails. Norquay argues that the lack of an innocent explanation prejudiced him because that testimony would have given an otherwise missing "non-sexual-relationship lens through which to view the ambiguous emails." According to Norquay, the e-mails must be understood in the context of events preceding the e-mails, such as a family meeting the day prior, discussions, and the imposition of discipline taking place at that time. However, counsel's performance did not prejudice the defense because the missing contextual information does not sufficiently address the most damaging part of the exchange: Norquay's closing instructions to "delete these e-mails and then delete them from your deleted items."

¶22 Finally, Norquay argues that he has established ineffective assistance based on the cumulative prejudice caused by trial counsel's errors. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. We disagree. Whether the alleged errors are taken individually or cumulatively, our confidence in the outcome of the trial is not undermined.

¶23 We also decline to grant a new trial in the interest of justice. It does not appear from the record that the real controversy in this case was not fully tried, or that it is probable that justice has miscarried. *See* WIS. STAT. § 752.35 (2011-12). Norquay is not entitled to 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. (2011-12).