COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP73-CR **Cir. Ct. No. 2012CF11**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN M. BAHR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM and JOSEPH W. VOILAND, Judges. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Kevin M. Bahr appeals from a judgment of conviction and an order denying his motion for postconviction relief.[1] He contends that his trial counsel was ineffective. He further contends that the circuit court erred in overruling his objection to a witness's testimony. We reject Bahr's claims and affirm the judgment and order.

¶2 Bahr was convicted following a jury trial of second-degree sexual assault by use of force. The charge stemmed from allegations that Bahr forcibly had nonconsensual sexual contact with a woman while the two were parked in his truck in the town of Belgium.

¶3 After sentencing, Bahr filed a motion for postconviction relief, raising, among other things, a claim of ineffective assistance of counsel and an alleged evidentiary error in the testimony of a witness. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

¶4 On appeal, Bahr first contends that his trial counsel was ineffective. Specifically, he complains that counsel (1) failed to object to Deputy Sheriff Michael Buechler's testimony relating the version of events that the victim gave to him[2] and (2) failed to object to the district attorney's use of word "gimmick" in the rebuttal portion of his closing argument when referring to the absence of a burden of proof for Bahr.

[1] The judgment of conviction was entered by the Honorable Thomas R. Wolfgram, and the Honorable Joseph W. Voiland signed the order denying Bahr's motion for postconviction relief.

[2] Bahr argues that such testimony was inadmissible hearsay.

¶5 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. ***Id.*** at 634.

¶6 With respect to Bahr's first complaint, the circuit court found that trial counsel made a strategic choice in not objecting to Buechler's testimony. The record supports that finding.

¶7 At the hearing on Bahr's postconviction motion, counsel described his decision not to object to Buechler's testimony as "purely strategic." Counsel believed that there were inconsistencies in the victim's version of events and wanted the jury to know how she had described the alleged assault to others. Counsel subsequently called the other investigating officer, Detective Christy Knowles, as a witness to recount the statement that the victim had given her. Counsel then argued the inconsistencies in the victim's version during closing argument.

¶8 Counsel's decisions in selecting trial strategy are to be given great deference. ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. Even decisions made with less than complete investigation may be sustained if reasonable, given the strong presumption of effective assistance and deference to strategic decisions. ***State v. Carter***, 2010 WI 40, ¶23, 324 Wis. 2d 640, 782

N.W.2d 695 (citing ***Strickland***, 466 U.S. at 690-91). On this record, we are satisfied that counsel's failure to object to Buechler's testimony resulted from reasonable trial strategy and not deficient performance.

¶9 With respect to Bahr's second complaint, the circuit court did not explicitly address the issue. We conclude that it does not support a claim of ineffective assistance of counsel.

¶10 As noted, the district attorney used the word "gimmick" in the rebuttal portion of his closing argument when referring to the absence of a burden of proof for Bahr. The comment came after the district attorney argued that defense counsel had misstated and mischaracterized the evidence and exaggerated the variations in the victim's statements.

¶11 An attorney is allowed considerable latitude during closing argument. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The line between permissible and impermissible final argument is determined by viewing the statement in the context of the total trial. *See* ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The constitutional test is whether the remark "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***Neuser***, 191 Wis. 2d at 136 (citation omitted).

¶12 We are not persuaded that the one-time use of the word "gimmick" in the context of the total trial was so significant as to infect the entire trial with the taint of unfairness. In any event, the circuit court properly instructed the jury regarding the burden of proof. Additionally, it properly instructed the jury that closing arguments are not evidence. We presume the jury follows the court's instructions, *see* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641

N.W.2d 490, and Bahr provides no reason for this court to conclude otherwise. Accordingly, we cannot conclude that counsel's failure to object to the district attorney's "gimmick" comment prejudiced Bahr.

¶13 Finally, Bahr contends that the circuit court erred in overruling his objection to a witness's testimony. In particular, he asserts that the objected-to testimony of Detective Knowles warrants a new trial.

¶14 Again, at trial, defense counsel called Knowles as a witness to recount the statement that the victim had given her. Knowles testified to some variation between the version of events the victim provided to her and the version she provided to Buechler.

¶15 On cross-examination, the district attorney asked whether it was "fair to state that memory for some people is not like a movie that they can simply replay back in their head and go frame to frame." He also asked whether people who suffered traumatic events could sometimes "lose the order" of what they remember. Both questions drew objections from defense counsel on grounds that they called for inadmissible expert testimony. The circuit court overruled the objections, and Knowles answered the questions in the affirmative.

¶16 Evidentiary rulings are committed to the circuit court's sound discretion. *See* ***Gross v. Woodman's Food Mkt., Inc.***, 2002 WI App 295, ¶32, 259 Wis. 2d 181, 655 N.W.2d 718. We generally look for reasons to sustain discretionary decisions and may, when necessary, search the record to determine if it supports the court's decision. *See* ***State v. Lock***, 2012 WI App 99, ¶43, 344 Wis. 2d 166, 823 N.W.2d 378.

¶17 Upon review of the record, we are not convinced that Knowles' objected-to testimony rose to the level of an expert witness. Her answers were based on her real life experiences and well within the realm of most people's common knowledge. Accordingly, we conclude that the circuit court did not err in overruling Bahr's objections.[3]

¶18 For these reasons, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

[3] Bahr also suggests that Knowles' testimony ran afoul of the ***Haseltine*** rule, which prohibits witnesses from rendering an opinion that another competent witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). ***Haseltine*** offers Bahr no support, as Knowles did not comment on the victim's truthfulness or even testify that she believed the victim.