COURT OF APPEALS DECISION DATED AND FILED

December 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP82-CR

Cir. Ct. No. 2010CF232

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRIS E. DEMINT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Chris E. DeMint was charged as a repeater with two counts of repeated sexual assault of the same child, the granddaughters of his

girlfriend, in violation of WIS. STAT. § 948.025(1)(b).[1] In a two-phase trial, a jury found him guilty and rejected his plea of not guilty by reason of mental disease or defect (NGI). DeMint contends that defense counsel rendered ineffective assistance during the NGI phase. We disagree and affirm the judgment of conviction and the order denying his postconviction motion seeking a new trial.

¶2 In the NGI phase, the court-appointed expert acknowledged that DeMint had "unusual or extreme" religious beliefs but testified that she did not believe he suffered from mental illness or defect at the time of the offenses.

¶3 DeMint also testified during the responsibility phase. In off-the-point ramblings, he testified that God talks to him; that God tells him to draw particular pictures, including of religious subjects and of Saddam Hussein, Barack Obama, and King Nebuchadnezzar; that he is a prophet; that he speaks in tongues; that he was trembling while testifying because he was "being touched by God"; and that he got a foretaste of the "rapture" following a serious car accident. DeMint described being in a "physical coma" when he committed the charged offenses, akin to how he says he felt during his own childhood sexual abuse when, to endure it, he would "take a mental walk."

¶4 DeMint acknowledged that he does not believe that his religious beliefs make him crazy or that the books of the Bible he referenced had anything to do with the offenses. He also acknowledged that he admitted to police that touching the two girls was wrong and that, just as he and his sister's were touched by adults when they were children was a bad thing, his touching the victims in this

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

case also was a bad thing. He admitted that he had not seen a psychologist or psychiatrist as an adult until being arrested in this case and that neither of the two doctors who examined him found that he suffered from a mental disease or defect.

¶5 The State met DeMint's religious-oriented testimony with that of Deputy Gerald Post, one of the first law enforcement officers to discuss DeMint's crimes with him. Post testified at length about his own religious beliefs, including that he speaks in tongues and that God has spoken to him, albeit not in "an audible voice." Post also related in some detail an on-duty incident in which he believed God specifically guided him in dealing and ultimately praying with a drunk driver.

¶6 In closing argument, defense counsel noted the stark contrast between Post's and DeMint's testimonies about their "God experiences." Counsel described as "rational" Post's demeanor when he told of hearing God's voice, compared to DeMint's bizarre, rambling discourses about God and religion which, she argued, were "not normal, abnormal." The jury found that DeMint did not have a mental disease or defect. Two jurors dissented.

¶7 Postconviction, DeMint argued that trial counsel's failure to object to Post's improper and irrelevant testimony was ineffective assistance and allowing the jury to hear that testimony clouded the real issue, warranting a new trial in the interest of justice. After a ***Machner***[2] hearing, the trial court denied the motion. DeMint appeals, raising the same claims.

¶8 We follow the familiar two-part analysis for ineffective assistance of counsel claims established in ***Strickland v. Washington***, 466 U.S. 668, 687

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

(1984). Under this framework, DeMint must demonstrate that his counsel's representation was deficient and that this deficient performance prejudiced him so that there is a "probability sufficient to undermine the confidence in the outcome." *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999) (citation omitted). 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 trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. The ultimate determination of whether counsel's performance fell below the constitutional minimum, however, is a question of law we review independently. ***Id.***

¶9 Trial counsel testified at the ***Machner*** hearing that, while she did not think about objecting to the evidence under WIS. STAT. § 904.03 (when relevant evidence may be excluded), she considered and rejected the idea of objecting to Post's testimony on relevancy grounds. First, after seeing "some jurors practically rolling their eyes," she believed the testimony "made [the State] look desperate." Second, seeing "very little evidence" to support DeMint's NGI claim, she thought it "would be a good tactic" to contrast the testimony of Post, "a calm, rational being with a good[-]paying job, and obviously a good person, to Mr. DeMint's testimony, which was out of control."

¶10 The trial court found that postconviction counsel's criticism of allowing Post's testimony amounted to "Monday morning quarterbacking." It also found that, given what little defense counsel had to work with, the course of action she pursued overall was a reasonable and rational trial strategy.

¶11 Like the trial court, we do not endorse second-guessing trial counsel's "considered selection of trial tactics or the exercise of a professional

judgment in the face of alternatives" he or she has weighed. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325. Also, the court's conclusion is compelling because it was able to view and evaluate counsel's performance first in the context of the trial and then with the benefit of counsel's explanation of her actions. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). That is especially true in a case such as this where, as the court noted, "the overwhelming credible evidence did not support [the] NGI plea." Accordingly, trial counsel's decision to proceed as she did was not outside the range of acceptable professional judgment. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). As we are satisfied that counsel's performance was not deficient, our ineffectiveness inquiry ends there. *See* ***Strickland***, 466 U.S. at 697.

¶12 DeMint also argues that he is entitled to a new trial in the interest of justice because Post's testimony about "hearing" God speak to him distracted the jury and prevented the real controversy—whether DeMint suffered from a mental disease or defect—from being tried. *See* WIS. STAT. § 752.35. Having held that trial counsel's performance was not deficient, we conclude this is not the case in which to exercise our power of discretionary reversal. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (we must reserve that power for the "exceptional" case).

By the Court.—Judgment and order affirmed.

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