COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP459-CR **Cir. Ct. No. 2010CF735**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK L. THORNTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Derrick Thornton, pro se, appeals an order denying his postconviction motion. Thornton raises various arguments on appeal, asserting: (1) he was denied his constitutional right to the effective assistance of trial counsel; (2) his convictions for kidnapping and human trafficking were not

supported by sufficient evidence; and (3) he is entitled to a new trial in the interest of justice. We reject Thornton's arguments and affirm.

BACKGROUND

¶2 Thornton was charged with one count each of kidnapping, human trafficking, pandering and solicitation of prostitutes. The court held a four-day jury trial, after which Thornton was found guilty on all counts. The State's chief witness was the victim, A.T., who testified that, in 2009, Thornton prevented her from leaving a hotel room and forced her to have a sexual encounter with him and another woman, Blake.

¶3 A.T. further testified that, in 2010, Thornton, apparently angry over her escape from him in 2009, forced A.T. into his vehicle as she was walking down a Milwaukee street. Over the course of several days, Thornton transported A.T. to various hotels located in Milwaukee, Wausau, Green Bay and Eau Claire, with the expectation that A.T. would prostitute herself for him. During this time, Thornton placed Internet advertisements offering sexual services from A.T., and at least two individuals solicited A.T. for sexual encounters. Blake accompanied A.T. and Thornton as they traveled around the state, and A.T. testified Thornton physically abused both of them. Thornton was ultimately apprehended in Wausau after A.T. told a hotel clerk she did not feel safe and he called the police.

¶4 Thornton filed a postconviction motion, which he later supplemented. He argued that he received ineffective assistance of trial counsel for various reasons, and that he should be granted a new trial in the interest of

justice. The circuit court held a ***Machner***[1] hearing, after which it denied Thornton's motion in an oral ruling that was later reduced to a written order.

DISCUSSION

¶5 Thornton's postconviction challenges generally fall into three categories.[2] First, he asserts he was denied his constitutional right to effective trial counsel, for various reasons. Second, Thornton challenges the sufficiency of the evidence to support his convictions for kidnapping and human trafficking. Third and finally, Thornton asserts he is entitled to a new trial in the interest of justice.

I. Ineffective assistance of trial counsel

¶6 Ineffective assistance of counsel claims are governed by the framework articulated in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Moffett***, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989). Under that framework, a convicted defendant must establish two requirements to demonstrate that trial counsel's assistance was constitutionally defective: (1) counsel's performance was deficient; and (2) the deficient performance resulted in prejudice to the defense. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334.

¶7 With respect to the first requirement, it is not enough for the defendant to show simply that counsel was "imperfect or less than ideal." ***Id.***, ¶22. An attorney need only render "reasonably effective assistance," which is assessed

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[2] Thornton raised several issues in his postconviction motion that he does not resurrect on appeal. We generally do not consider or decide issues that are not specifically raised on appeal. ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992).

based on the totality of the circumstances, and evaluated from counsel's perspective as of the time of the challenged conduct. ***Strickland***, 466 U.S. at 687, 689-90. Our review is highly deferential: "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id.*** at 690. Strategic choices made after a thorough investigation of the relevant law and facts are "virtually unchallengeable." ***Id.***

¶8 With respect to the prejudice requirement, the defendant must show that counsel's particular unprofessional errors adversely affected the defense. ***Balliette***, 336 Wis. 2d 358, ¶24. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." ***Strickland***, 466 U.S. at 693. Instead, the defendant must demonstrate "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." ***Id.*** at 695.

¶9 Whether the defendant has established ineffective assistance of counsel is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the circuit court's factual findings unless they are clearly erroneous. ***Id.*** at 634. The ultimate questions of whether counsel's conduct was deficient and prejudicial to the defendant are questions of law, for which no deference is owed to the circuit court. ***Id.***

¶10 Here, Thornton alleges his trial counsel performed deficiently in five respects: (1) failure to object to portions of A.T.'s testimony on hearsay grounds; (2) failure to call detective Terrence Morris to testify; (3) failure to call Erio McClure, A.T.'s probation officer, to testify; (4) failure to request a *falsus in uno*

jury instruction; and (5) failure to call Latasha Golden, an acquaintance of A.T., to testify.

A. Failure to object to portions of A.T.'s testimony

¶11 Thornton first asserts his trial counsel was deficient for failing to object to portions of A.T.'s testimony that he claims were hearsay, the admission of which violated Thornton's Sixth Amendment right to confront adverse witnesses. Thornton is unclear what, precisely, the allegedly offending testimony was, but his postconviction motion referred to A.T.'s testimony that Thornton: (1) made A.T. kneel over a bed naked and struck her with his belt, then sent A.T. into the bathroom and did the same to Blake; (2) burned Blake's hand with a cigarette; and (3) kicked Blake in the head.

¶12 The circuit court concluded the challenged testimony consisted of A.T.'s direct observations and thus was not hearsay. We agree. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3).[3] None of the cited testimony attempted to bring before the jury statements made by an out-of-court declarant.

¶13 Instead, A.T. gave the challenged testimony in response to a question about what acts of physical violence she actually observed. A.T.'s testimony is clear that she was present when each act of abuse occurred, and she testified specifically that she saw the cigarette and kicking incidents. To the extent

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Thornton contends A.T. could not have seen him strike Blake from A.T.'s position in the bathroom, there is nothing in the cited testimony suggesting it would have been impossible for A.T. to witness the assault—for example, if the bathroom door had been closed. Any potential concerns regarding A.T.'s ability to actually observe Blake's assault went to the weight of the evidence, not its admissibility.

¶14 Accordingly, we conclude trial counsel's failure to object to A.T.'s testimony on hearsay grounds was not deficient performance. A hearsay objection would have been properly overruled. *See* ***State v. Johnson***, 2004 WI 94, ¶24, 273 Wis. 2d 626, 681 N.W.2d 901 (counsel does not perform deficiently by failing to make an objection that would have been overruled).

B. Failure to call detective Terrence Morris to testify

¶15 Thornton next challenges his attorney's failure to call detective Terrence Morris, the lead investigator in the case until his retirement, to testify at trial. Thornton argues Morris authored a police report which called into question A.T.'s trial testimony that, after Thornton kidnapped her in Milwaukee, she was unable to open the vehicle's passenger door because it had child safety locks. At the ***Machner*** hearing, Morris testified that he inspected the locks a week after Thornton was apprehended and it appeared "that the locks were not working properly and that somebody could have gotten out of that vehicle by pushing the … button over to the open position and then using the handle to get out."

¶16 The circuit court concluded trial counsel was not deficient because Morris was unavailable for trial, and Morris's conclusion that the locks were not working properly was presented to the jury through means other than his testimony. During cross-examination, Thornton's trial counsel relied upon the fact of Morris's conclusion when he asked A.T. whether she was aware that "Detective

Morris has checked the … vehicle that you were a passenger in and found there is no child safety protection?" Trial counsel returned to this point while cross-examining another police officer, asking whether Morris told her about the vehicle doors.

¶17 Under these circumstances, Morris's testimony would have been cumulative. Evidence is cumulative when it supports a fact established by existing evidence. ***State v. Prineas***, 2012 WI App 2, ¶27, 338 Wis. 2d 362, 809 N.W.2d 68. Here, even though Morris was unavailable to testify, trial counsel nonetheless made the jury aware of Morris's conclusion that the child safety locks were not working properly when the vehicle was inspected by police. Accordingly, we conclude Thornton has established neither deficient performance nor prejudice stemming from his trial counsel's failure to call Morris as a witness.

C. Failure to call Erio McClure to testify

¶18 Thornton next argues his trial counsel should have called A.T.'s probation agent, Erio McClure, to testify.[4] Thornton argues McClure's testimony was necessary to challenge A.T.'s trial testimony that Thornton had kidnapped her three times, and that she had told McClure about the third, previously unreported incident. At the ***Machner*** hearing, Thornton's trial counsel testified he wanted McClure to testify at trial, because she would testify that A.T. had a history of prostitution. Counsel believed McClure had testified during the trial, but he could not remember what had happened or why she had not testified.

[4] A.T. was apparently on supervision following a conviction in an unrelated case.

¶19 In fact, the parties and the court did have an unsworn telephone conversation with McClure, outside the presence of the jury, on the third day of trial. Defense counsel asked whether McClure had any recollection of A.T. telling her about a third kidnapping. McClure could remember A.T. saying "something about this gentleman having kidnapped her before," but she could not remember the number of times A.T. said she had been kidnapped. McClure could not locate any written reports in her files regarding A.T.'s statements, but promised to try to obtain further information.

¶20 At the ***Machner*** hearing, McClure testified that by the time of trial, A.T.'s file had been terminated and transferred to storage. After the phone conversation, McClure attempted to find a written record of A.T.'s statements, but McClure testified no such record was in the file and it appeared to have been lost. McClure said she told the assistant district attorney handling the case that no written record of A.T.'s statements could be located. McClure testified she had no independent recollection how many times A.T. said she had been kidnapped by Thornton.

¶21 Thornton argues his trial counsel's failure to call McClure as a witness was ineffective assistance because: (1) no strategic reason was given for the failure; (2) McClure was the only person who could directly rebut A.T.'s statement that she told McClure about a third kidnapping; and (3) McClure's testimony was clear that she had no memory of a third kidnapping allegation. Thornton ignores, however, that McClure's testimony would have added nothing to his case. McClure had no independent recollection of A.T.'s statements, and she could not locate any record in which those statements were memorialized. In fact, McClure could only remember that A.T. said Thornton kidnapped her more than once.

¶22 Consequently, McClure's testimony would not have been effective to rebut A.T.'s testimony that Thornton had kidnapped her a third time, and Thornton's argument that McClure had no memory of a third kidnapping is incomplete. McClure could not have testified that A.T. *did not* say she had been kidnapped three times. McClure simply did not remember the conversation with sufficient detail to be of any aid to Thornton, and, with respect to counsel's reason for wanting McClure to testify, the jury was aware from A.T.'s own testimony that she had prostituted before. Trial counsel did not perform deficiently by failing to call a witness that would have added nothing to Thornton's defense, and Thornton certainly has not shown a reasonable probability of a different result based on McClure's rather insignificant testimony.

¶23 Thornton's final argument regarding McClure, made for the first time in his reply brief, is convoluted, but easily rejected. He argues as follows: If McClure did not make a written report of A.T.'s statements, then A.T. did not tell McClure she had been kidnapped three times, because if A.T. had made such a statement, a report of that fact would have been made. Thornton proceeds from a false premise. McClure did not testify that no report was made; rather, she testified that any such report could not be located. In sum, trial counsel was not ineffective for failing to call McClure to testify, because any record of A.T.'s statements to McClure had been lost by the time of trial, and McClure had no independent recollection of those statements.

D. Failure to request falsus in uno jury instruction

¶24 Thornton asserts his trial counsel was ineffective for failing to request a *falsus in uno* jury instruction. This instruction tells the jury that, if it is "satisfied from the evidence that any witness has willfully testified falsely as to

any material fact, you may disregard all the testimony of the witness which is not supported by other credible evidence in the case." WIS JI—CRIMINAL 305 (2001). The instruction is a "derivation of the old maxim, *falsus in uno, falsus in omnibus*, or translated, 'false as to one thing, false as to all things.'" ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 658, 505 N.W.2d 399 (Ct. App. 1993) (quoting 4 JONES ON EVIDENCE § 29.12 (6th ed. 1972)).

¶25 Thornton has not met his burden of showing that counsel performed deficiently by failing to request the *falsus in uno* instruction. Thornton contends the instruction was necessary given his theory of defense that A.T. fabricated the allegations against Thornton. However, the instruction is appropriate only if the false testimony concerns a material point and is made willfully and intentionally. *See* ***State v. Williamson***, 84 Wis. 2d 370, 394, 267 N.W.2d 337 (1978), *abrogated on other grounds by* ***Manson v. State***, 101 Wis. 2d 413, 304 N.W.2d 729 (1981). Thornton has not explained what material fact he believes A.T. testified to falsely, nor has he presented "a sufficient basis in the evidentiary facts and circumstances adduced as tends to show that there was willfully false swearing." *See* ***Pumorlo v. Merrill***, 125 Wis. 102, 110, 103 N.W. 464 (1905); *see also* ***Williamson***, 84 Wis. 2d at 394. To the extent Thornton argues A.T. lied about the ultimate facts underlying his convictions, it seems apparent that if the jury so believed, it would have found him not guilty, regardless of whether the *falsus in uno* instruction had been given.

¶26 In addition, Thornton has failed to show prejudice. The circuit court accepted trial counsel's testimony at the ***Machner*** hearing that he did not request the instruction because no judge he has practiced in front of has ever given it. Indeed, the "instruction is not favored in the law," ***Williamson***, 84 Wis. 2d at 395, and the instruction itself states, "USE OF THIS INSTRUCTION IS NOT

FAVORED," WIS JI—CRIMINAL 305. The court stated that it probably would not have given the instruction even if requested, and it observed that Thornton's trial counsel had argued the substance of the instruction to the jury during closing argument. Accordingly, Thornton has failed to show both that the instruction should have been given, and that there was a reasonable probability that the jury, even if given the instruction, would have found him not guilty.

E. Failure to call Latasha Golden to testify

¶27 Thornton next argues his attorney was ineffective for failing to call Latasha Golden, an acquaintance of A.T., to testify. There were ample strategic reasons for not doing so, to which his counsel testified at the ***Machner*** hearing. Counsel testified that although Golden was cooperative when she first spoke to counsel's private investigator, she subsequently "slammed the door on the investigator's face and … screamed at her and told her she was not going to be coming to any trial and nobody could make her, and frankly, I thought that we didn't need a loose cannon in the courtroom during the trial." The circuit court credited this testimony and concluded counsel did not perform deficiently. We agree.

¶28 Further, Golden's testimony was not highly probative. According to Thornton, Golden would have testified that A.T. previously sought out "pimps" for whom she would prostitute, and carried her own clothing with her when she did so. However, contrary to Thornton's claim, this testimony would not have proven false A.T.'s testimony that Thornton purchased clothing for her, which he made her wear and which was subsequently found in his van. Moreover, some of Golden's anticipated testimony may actually have bolstered A.T.'s credibility, as A.T. acknowledged at trial that she had been a prostitute and a stripper.

Accordingly, we cannot accept Thornton's argument that Golden's testimony was "absolutely crucial to the defense." To the extent Thornton argues counsel was deficient for failing to use compulsory process to secure Golden's testimony, the nature of her testimony, coupled with her hostile conduct toward his investigator, rendered counsel's decision not to do so reasonable in this regard.

II. Sufficiency of the evidence

¶29 Thornton argues, in his brief-in-chief, that there was insufficient evidence to support his convictions for kidnapping and human trafficking. The State thoroughly dissects this argument by reciting the elements of both offenses, then pointing to specific trial evidence, or inferences from that evidence, sufficient to satisfy those elements. Our review of the sufficiency of the evidence

> is highly deferential to a jury's verdict, and … [we] may not overturn a jury's verdict unless the evidence, viewed most favorably to sustaining the conviction, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt."

State v. Beamon, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681, *cert. denied*, 134 S. Ct. 449 (2013) (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)).

¶30 In Thornton's reply brief, he concedes he framed his argument "under an incorrect theory" when he alleged his convictions for kidnapping and human trafficking were supported by insufficient evidence. Instead, Thornton claims he really intended to argue that the charges were multiplicitous. As a general rule, we will not review issues raised for the first time in a reply brief. ***Baraboo Nat'l Bank v. State***, 199 Wis. 2d 153, 157 n.1, 544 N.W.2d 909 (Ct. App. 1996). This rule exists because permitting Thornton to raise new issues in

his reply brief gives him an advantage over the State, as the State cannot counter those issues. *See* ***id.***

¶31 Even if we were to disregard this well-established rule out of recognition that Thornton, as a pro se litigant, deserves a bit of leeway for his failure to comply with appellate rules, *see* ***Rutherford v. LIRC***, 2008 WI App 66, ¶27, 309 Wis. 2d 498, 752 N.W.2d 897, we would nonetheless conclude that Thornton's multiplicity challenge must fail because it is undeveloped.[5] Multiplicity "exists when the defendant is charged in more than one count for a single offense." ***State v. Hirsch***, 140 Wis. 2d 468, 471, 410 N.W.2d 638 (Ct. App. 1987). Charges are multiplicitous if they are identical in law and fact, or, if they are not identical in law and fact, if the legislature intended the multiple offenses to be brought as a single count. ***State v. Davison***, 2003 WI 89, ¶¶43-45, 263 Wis. 2d 145, 666 N.W.2d 1.

¶32 Thornton does not address either of these criteria in his reply brief, instead asking this court to develop an argument on his behalf. We decline to do so. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (We will not abandon our neutrality to develop arguments on behalf of the parties.). Therefore, in addition to the other procedural infirmities with Thornton's multiplicity argument, we deem the argument undeveloped and decline to address it on the merits. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[5] In addition, Thornton's multiplicity argument does not appear to have been made before the circuit court. We decline to review constitutional issues raised for the first time on appeal unless the defendant has demonstrated compelling reasons for doing so, which Thornton has not. *See* ***State v. Wilks***, 121 Wis. 2d 93, 107, 358 N.W.2d 273 (1984).

III. Reversal in the interest of justice

¶33 Thornton requests that we exercise our discretionary reversal authority under WIS. STAT. § 752.35, because there has been a miscarriage of justice. A defendant asking that we reverse a conviction due to a miscarriage of justice must demonstrate a substantial probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). We will exercise our power of discretionary reversal only in exceptional cases, and, as a general rule, we do not review an alleged error unless it has been properly preserved. ***State v. Bannister***, 2007 WI 86, ¶42, 302 Wis. 2d 158, 734 N.W.2d 892.

¶34 Here, Thornton argues there has been a miscarriage of justice primarily because Janelle Voss, a motel manager in Milwaukee, did not testify at trial. Thornton asserts that Voss would have testified, consistent with statements she gave to a police detective, that Thornton and A.T. were regular customers, and that A.T. never appeared to be in danger and could have left or told her to call the police at any time.

¶35 Not only did Thornton fail to preserve the alleged error in the circuit court, Thornton himself was responsible for Voss not testifying at trial. Thornton told his trial counsel that Voss misidentified the victim—i.e., that it was not A.T. accompanying Thornton. Thornton now argues this was a "foolish tactical decision made by him," but it was one he made nonetheless. We are not inclined to entertain appeals to our discretionary reversal authority when the principal

reason for such an appeal is the defendant's own conduct.[6] "If a defendant selects a course of action, that defendant will not be heard later to allege error or defects precipitated by such action." ***State v. Robles***, 157 Wis. 2d 55, 60, 458 N.W.2d 818 (Ct. App. 1990), *aff'd sub nom.* ***State v. Martin***, 162 Wis. 2d 883, 470 N.W.2d 900 (1991).

¶36 Thornton argues, without citation to authority, that we should overlook his tactical error because it has "clouded the truth." To the extent this is a request to exercise our discretionary reversal authority because the real controversy has not been fully tried, *see* WIS. STAT. § 752.35, we deem his argument undeveloped and reject it, *see* ***Pettit***, 171 Wis. 2d at 646. Aside from Voss's testimony—which, again, Thornton himself caused not to be introduced—Thornton again argues the jury should have had the opportunity to consider direct testimony from Morris and Golden. However, he does not explain how, absent their testimony, "the jury was precluded from considering 'important testimony that bore on an important issue' or … certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)).

¶37 For the foregoing reasons, we conclude the interests of justice do not warrant our discretionary reversal of Thornton's judgment of conviction and our ordering of a new trial.

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[6] We note that Thornton could not prevail on an ineffective assistance of counsel claim on this basis, either. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985) (reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions).

By the Court.—Order affirmed.

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