COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1288-CR **Cir. Ct. No. 2012CF612**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANCEY LOVETT SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Lancey Lovett Smith appeals a judgment of conviction entered after a bench trial in which the circuit court found him guilty of two counts of physical abuse of a child. He also appeals a postconviction order denying his motion for a new trial or resentencing on the ground that his trial

counsel was ineffective. Smith contends his trial counsel should have: (1) objected to certain trial testimony from a victim and a witness on the ground that the evidence proved only his propensity to commit bad acts; and (2) objected to the presentence investigation report (PSI) on the ground that it included a sentencing recommendation that should have been omitted. We reject his claims and affirm.

BACKGROUND

¶2 On January 25, 2012, seventeen-year-old T.M. told a police officer assigned to his high school that he had received a beating the previous day from his mother's boyfriend, Smith. Following an investigation, the State charged Smith with one count of physically abusing T.M., and one count of physically abusing L.S., Smith's seven-year-old son. Smith demanded a trial. He waived his right to a jury, and the matter was tried to the court.

¶3 M.F. testified that she is the mother of both L.S. and T.M., and that, on January 24, 2012, Smith was living with her and her sons. M.F. said she heard "very hard slap sounds" that night, and she heard L.S. crying out "no, daddy." When she ran into L.S.'s bedroom, Smith held up a belt and "asked [her] if [she] wanted some next and proceeded to push [her] against the bedroom wall." The State asked her how this made her feel and she said: "[h]e did stuff like that quite often, so I wasn't afraid. I just wanted him to stop hitting [L.S.]."

¶4 M.F. said that after Smith left L.S.'s bedroom, she heard T.M. calling for her. When she entered the living room, she saw that Smith had pinned T.M. against a dresser. T.M. was holding a fork, and Smith was punching T.M. in the head.

¶5 On cross-examination, M.F. acknowledged that she did not call the police at any time on the night of the incident. When asked why she did not do so, she said: "Smith informed me that if I ever went to the police department or I attempted to dial 911, I would be dead before I reached the door."

¶6 T.M. testified that, on the night of January 24, 2012, he was in the living room when Smith entered and attacked T.M. after accusing him of raping L.S. T.M. said he tried to protect himself with a fork but Smith restrained T.M. and turned the fork on him, injuring his chin. T.M. acknowledged that he did not call the police that night, stating that he refrained from doing so because Smith said "he would kill" M.F. and T.M. "before [M.F.] even got to the phone."

¶7 On cross-examination, T.M. said he and Smith "hate each other." Defense counsel asked why, and T.M. said he hated Smith "because he beat me since I was like ten years old."

¶8 L.S. testified. He identified a picture of himself with a bruised leg and said he was hit with a belt. He would not say who hit him but he said he remembered telling police that his father caused the injury, and he said he told police the truth.

¶9 Kelly Blalock, Smith's employee and former girlfriend, testified for the defense. She said that, in late January 2012, she overheard T.M. telling M.F. that he caused some of his own injuries. Blalock also said Smith never discussed with her the details of what happened on January 24, 2012, but he did ask her something to the effect of whether she "could believe that [M.F.] ... had T.[M] call the police on 'em[sic]."

¶10 Smith testified on his own behalf. He acknowledged hitting L.S. twice with a belt on January 24, 2012, explaining that the actions followed L.S.'s failure to do his math homework properly. Smith said he and T.M. argued later in the evening, and Smith was forced to defend himself when T.M. attacked Smith with a fork.

¶11 The circuit court ruled from the bench. The circuit court rejected the defense theories, namely, that Smith's actions in regard to L.S. constituted reasonable parental discipline and that Smith's actions in regard to T.M. constituted self-defense. The circuit court found the State had proved Smith guilty beyond a reasonable doubt of two counts of physically abusing a child.

¶12 The circuit court told the parties that it wanted the Department of Corrections to prepare a PSI to assist the court at sentencing. When Smith indicated that he was not requesting a PSI, the circuit court added that it was willing to order a PSI without a sentencing recommendation, and Smith agreed to that procedure. Nonetheless, the circuit court did not order the Department to omit a sentencing recommendation, and the PSI filed in this matter included a recommendation that Smith receive two, consecutive, four-year sentences, each evenly bifurcated between initial confinement and extended supervision.

¶13 At sentencing, the State asked the circuit court to impose an aggregate sentence of four years of initial confinement and four years of extended supervision, effectively seeking the same disposition as that recommended in the PSI. Smith requested a sentence of time served. After considering various factors, including the harm Smith caused his victims, his criminal record, and his need for services to assist him in learning to live safely in the community, the circuit court imposed the disposition recommended by the Department and the State.

¶14 In postconviction proceedings, Smith alleged his trial counsel was ineffective for failing to object to trial testimony that he claimed constituted improper evidence of his propensity to commit bad acts. He also alleged his trial counsel was ineffective for failing to object to the sentencing recommendation in the PSI. The circuit court rejected these claims in a written order entered without a hearing.[1] Smith appeals.

DISCUSSION

¶15 A defendant who claims trial counsel was ineffective must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697.

[1] The circuit court granted Smith's requests to award sentence credit and to vacate a DNA surcharge. The State did not challenge these postconviction decisions, and we do not discuss them further.

¶16 Smith alleges his trial counsel was ineffective for failing to object to testimony from T.M. and M.F. regarding Smith's prior abusive actions on the ground that the evidence was improper propensity evidence barred under WIS. STAT. § 904.04(2) (2013-14).[2] Because an attorney is not ineffective for failing to challenge evidence that the circuit court properly admitted, *see* ***State v. Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369, we must assess Smith's claims in light of the standard governing admissibility of prior acts evidence.

¶17 WISCONSIN STAT. § 904.04(2)(a) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." The statute, however, "does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.*** Indeed, § 904.04(2) "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." ***State v. Speer***, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993).

¶18 Admission of evidence pursuant to WIS. STAT. § 904.04(2) is governed by a three-step inquiry: (1) whether the evidence is offered for a permissible purpose, as required by § 904.04(2)(a); (2) whether the evidence is relevant within the meaning of WIS. STAT. § 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the concerns enumerated in

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

WIS. STAT. § 904.03, namely, "unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence[.]" *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Whether to admit other acts evidence lies within the circuit court's discretion. *See* ***id.*** at 780. If our review of the record reveals a basis for the circuit court's decision, we must uphold it. *See* ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832. Here, the record supports admission of the evidence that Smith challenges on appeal.

¶19 We begin with Smith's allegation that trial counsel was ineffective for failing to object to T.M.'s testimony that Smith "beat [T.M.] since [he] was like ten years old." As we have seen, T.M. offered this testimony during cross-examination, in response to Smith's question about why T.M. hated Smith.

¶20 The first step of the ***Sullivan*** analysis requires an acceptable purpose for the disputed evidence. *See* ***Payano***, 320 Wis. 2d 348, ¶63. "[T]his 'first step is hardly demanding.'" ***Id.*** (citation and emphasis omitted). The record here reflects an acceptable reason for presenting this evidence. Smith alleged that he acted in self-defense after T.M. attacked Smith. This defense required the fact finder to believe the allegation that T.M. attacked Smith. Trial counsel appropriately supported the defense by showing a reason for T.M. to attack as Smith alleged. Step one of the analysis is therefore satisfied.

¶21 The second step in the ***Sullivan*** analysis requires that the evidence be relevant. *See* ***id.***, 216 Wis. 2d at 772. Here, the past history between Smith and T.M. aided in establishing the facts underlying Smith's self-defense claim. Step two is therefore satisfied.

¶22 As to step three, Smith asserts "any probative value that [T.M.'s] sweeping statement may have had was substantially outweighed by the danger of undue prejudice." In the context of a ***Sullivan*** analysis, however, "[t]he specific danger of unfair prejudice ... 'is the potential harm in a jury's concluding that because an actor committed one bad act, he necessarily committed the crime with which he is now charged.'" ***Payano***, 320 Wis. 2d 348, ¶89 (citations omitted). Therefore, "[t]he circuit court's job is to ensure that the jury will not 'prejudge a defendant's guilt or innocence in an action because of his prior bad act.'" ***Id.*** (citation omitted).

¶23 Smith's case was not tried to a jury. The circuit court was the fact finder. Smith was therefore not at risk of suffering the harm that step three of the ***Sullivan*** analysis is designed to avoid. Indeed, some reviewing courts have concluded that "in a bench trial 'excluding relevant evidence on the basis of 'unfair prejudice' is a useless procedure. [Federal] Rule 403[3] assumes a trial judge is able to discern and weigh the improper inferences, and then balance those improprieties against probative value and necessity.'" *See* ***United States v. Cameron***, 729 F. Supp. 2d 411, 416 (D. Me. 2010) (citing ***Gulf States Utils. Co. v. Ecodyne Corp.***, 635 F.2d 517, 519 (5th Cir. 1981)); ***Schultz v. Butcher***, 24 F.3d 626, 631-32 (4th Cir. 1994); ***Tracinda Corp. v. DaimlerChrysler AG***, 362 F. Supp. 2d 487, 497 (D. Del. 2005).

¶24 Moreover, even when evidence is wrongly admitted during a bench trial, we assume the trial judge will identify the competent evidence and ignore the

[3] FEDERAL R. EVID. 403 is a federal rule of evidence parallel to WIS. STAT. § 904.03. *See* ***State v. Alexander***, 214 Wis. 2d 628, 641, 571 N.W.2d 662 (1997).

remainder. *See* ***State v. Cathey***, 32 Wis. 2d 79, 90, 145 N.W.2d 100 (1966). In the instant case, where we have determined that T.M.'s disputed testimony served a proper purpose, we may assume the trial judge considered the testimony for that proper purpose only.

¶25 Because the circuit court correctly heard T.M.'s disputed testimony, Smith cannot prevail on a claim that his trial counsel was ineffective by failing to challenge admission of that testimony. Accordingly, Smith's first claim for relief fails. *See* ***Ziebart***, 268 Wis. 2d 468, ¶14.

¶26 We turn to Smith's contention that M.F. gave testimony that should have been excluded under WIS. STAT. § 904.04(2). M.F. described how Smith displayed the belt he had used to hit L.S., pushed her, and "asked [her] if she wanted some next." When the State asked how that made her feel, she responded with the remark Smith believes is objectionable: "he did stuff like that quite often, so I wasn't afraid. I just wanted him to stop hitting." Because the State could properly present this testimony, we reject the claim.

¶27 Other acts evidence is admissible in a criminal trial "to show the context of the crime and to provide a complete explanation of the case." ***State v. Hunt***, 2003 WI 81, ¶58, 263 Wis. 2d 1, 666 N.W.2d 771. Such evidence is also admissible to rebut a defendant's claims. *See* ***Payano***, 320 Wis. 2d 348, ¶3. Here, Smith emphasized at trial that M.F. did not call the police on January 24, 2012, but remained in the home with him and the children after he allegedly abused L.S. and T.M. Smith suggested M.F.'s behavior demonstrated he did not commit a crime that night. The State wanted to rebut that suggestion. M.F.'s testimony describing Smith's past actions illuminated the circumstances within the household, refuted Smith's interpretation of M.F.'s actions in response to his abuse, and explained

why she did not call the police. Accordingly, the evidence satisfied the first step of the ***Sullivan*** analysis because the evidence served a proper purpose under WIS. STAT. § 904.04(2).

¶28 Smith disagrees. He contends M.F.'s testimony was not offered to rebut his defense because, he says, the State elicited the testimony during M.F.'s direct examination, before Smith presented any evidence or examined any witnesses. Smith does not deny, however, that M.F.'s failure to call the police was a significant component of his theory of defense. He thoroughly and extensively cross-examined M.F. in regard to that failure, and he would have elicited additional testimony from her about the issue but for the State's objection that the questions were asked and answered. During closing argument, Smith emphasized M.F.'s responses on cross-examination, and he reminded the circuit court that M.F. did not report the incident or leave the home with the children despite having "every opportunity, for hours and hours and hours." Thus, the crux of Smith's complaint is that the State was premature in presenting testimony to rebut his defense, but that is not an error. "[T]he [circuit] court may … receive proof out of order." ***Putman v. Deinhamer***, 270 Wis. 157, 164, 70 N.W.2d 652 (1955). Indeed, in the context of examining a challenge to other acts evidence, we have rejected a challenge based on the order of presentation. *See* ***State v. Norwood***, 2005 WI App 218, ¶24, 287 Wis. 2d 679, 706 N.W.2d 683.

¶29 Smith next contends that, even if M.F.'s testimony served a permissible purpose, the testimony was irrelevant and thus fails the second step of the ***Sullivan*** analysis. Specifically, Smith argues the State had sufficient testimony that did not include other acts evidence to explain why M.F. failed to call the police and remained in the home on January 24, 2012, namely: "both [M.F.] and T[.]M[.] ultimately testified that [M.F.] did not call the police on that

evening because Smith threatened them against doing so." Therefore, Smith says, M.F.'s testimony about his past actions and how they affected her on January 24, 2012, was unnecessary and lacked probative value. We are not persuaded. Evidence showing context and providing insight into the particular circumstances of the crime is admissible "to provide a *complete* explanation of the case." *See* ***Hunt***, 263 Wis. 2d 1, ¶58 (emphasis added). A partial explanation is no substitute.

¶30 Accordingly, the record reflects a permissible purpose for M.F.'s testimony and shows the evidence was relevant to an issue in the case. As to the third step in the ***Sullivan*** analysis, we again presume the circuit court considered the evidence for a proper purpose and, therefore, the probative value did not substantially outweigh the danger of unfair prejudice. *See* ***Cathey***, 32 Wis. 2d at 90.

¶31 Smith responds that the presumption is inapplicable because, he says, the circuit court's statements when delivering the verdicts reveal the circuit court did use the other acts evidence for an improper purpose. We have carefully examined those statements in light of the evidence, and we are unpersuaded that the circuit court's remarks reveal any improper reliance on evidence that Smith challenges on appeal.

¶32 Smith points to the circuit court's finding that M.F. and T.M. gave testimony "that they had been repeatedly treated [sic – entreated?] not to call the police. Don't call the police things are gonna get worse, things are gonna get more violent in the household and they were told repeatedly not to call the police, not to make any reports." We do not agree with Smith's conclusion that these remarks reflect improper use of M.F.'s testimony about Smith's prior actions.

¶33 Both T.M. and M.F. testified that Smith told them not to call the police or he would kill them. As Smith concedes, he does not allege that his trial counsel erred by failing to exclude that evidence. The circuit court therefore properly considered that evidence in reaching the verdicts here.[4]

¶34 Smith also points to the circuit court's discussion of Blalock's testimony, particularly Blalock's description of Smith's "amaze[ment], months afterwards, that [M.F.] had the nerve and the courage to [speak to law enforcement].... [T]hat does speak to the fact of the level of intimidation was quite strong and intense inside the family." According to Smith, these components of the circuit court's decision reveal that the circuit court considered "the alleged history of violence impermissibly developed through the other acts evidence." To the contrary, the remarks show that the circuit court properly relied on Blalock's testimony to reach conclusions about the atmosphere in the home.

¶35 In sum, Smith fails to show that M.F.'s disputed testimony should have been excluded under ***Sullivan***. Because Smith shows no error in admitting the evidence at trial, he fails to show that trial counsel performed deficiently by failing to object to the testimony. *See* ***Ziebart***, 268 Wis. 2d 468, ¶14. Accordingly, his claim for relief on this basis fails.

¶36 We turn to Smith's claim that his trial counsel was ineffective for failing to object to the sentencing recommendation in the PSI. Smith emphasizes that the circuit court imposed the sentence recommended by the State and the

[4] The circuit court apparently understood the testimony of M.F. and T.M. as describing repeated entreaties by Smith not to call the police. We cannot agree that the circuit court's interpretation of admissible testimony reveals an improper use of other acts evidence.

Department, and he contends: "there is a reasonable likelihood that the circuit court would not have felt it necessary to adopt that exact amount of time had it been simply the State's recommendation." Smith however, points to nothing suggesting a circuit court normally rejects a prosecutor's recommendation unless it matches the recommendation found in a PSI. A defendant must offer more than rank speculation to prevail on a claim that counsel was ineffective. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

¶37 Moreover, the record indicates neither the State nor the PSI persuaded the circuit court to select the term imposed. The circuit court explained in its postconviction order here that the sentence was based on relevant sentencing factors and would not have been different had the PSI omitted a recommendation.[5] *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has an additional opportunity to explain its sentence during postconviction proceedings). Smith argues we should focus on the transcript of the sentencing proceeding, not the circuit court's after-the-fact assertions made during postconviction proceedings. Such a focus does not aid him. During sentencing, the circuit court explained it considered whether to impose a more lenient disposition than that recommended by the State and the Department. The circuit court noted, however, that Smith had seventeen prior convictions, most of which involved "[M.F.], her children, and the home situation," and the circuit court concluded, in light of Smith's history "and everything in this trial, [it]

[5] A sentencing court must consider "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentencing court may also consider numerous other factors when fashioning a sentence. *See* ***id.*** Smith does not suggest the circuit court failed to consider proper sentencing factors in his case.

d[id]n't believe a less restrictive" disposition than the eight years chosen would be "appropriate." Thus, the circuit court explained at sentencing that factors unrelated to the recommendation in the PSI necessitated four years of initial confinement and four years of extended supervision.

¶38 In light of the totality of the record, Smith fails to show a reasonable probability that a PSI without a recommendation would have led to a more lenient disposition. Accordingly, we conclude Smith has failed to show any prejudice from trial counsel's failure to object to the PSI. *See* ***Strickland***, 466 U.S. at 694.

By the Court.—Judgment and order affirmed.

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