COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-2857-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GUSTAVO HINOJOSA,

DEFENDANT-APPELLANT,

JAVIER SALGADO,

DEFENDANT.

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

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Gustavo Hinojosa appeals from a judgment entered after a jury found him guilty of second-degree sexual assault of a child. *See* WIS.

STAT. § 948.02(2) (1997-98).[1] He also appeals from an order denying his motion for postconviction relief. He argues: (1) that the trial court erred in excluding evidence of the victim's previous sexual conduct that, he alleges, provided an alternate explanation of the source of the injuries to her vaginal and anal areas; (2) that he received ineffective assistance of trial counsel; (3) that trial counsel's alleged errors constitute plain error; and (4) that he is entitled to a new trial in the interest of justice because the real controversy has not been fully tried. We affirm.

BACKGROUND

¶2 On December 29, 1996, fifteen-year-old Angela T. went to a party at Hinojosa's house. Angela testified that, at the party, she met Javier Salgado and Hinojosa, and that they were referred to as "Ricky," and "Ricky's dad," respectively.

¶3 Angela had been drinking before she went to the party, and she continued to drink at the party. She became so drunk that she passed out and was taken into Hinojosa's bedroom and placed on his bed. Angela testified that she awoke to find herself naked, with Salgado on top of her having vaginal intercourse with her. She testified that she then passed out again, and later awoke when Hinojosa was on top of her. She testified that Hinojosa had both vaginal and anal intercourse with her. Angela testified that she continued to slip in and out of consciousness throughout the night, and that she was later placed in the shower, fully-clothed, and doused with water.

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

¶4 The two girls who took Angela to the party, Sarah V. and Laura B., then placed Angela in the car and drove back to Sarah's house. They left Angela asleep in the car and went into the house to go to sleep. When Angela awoke, she was wet and cold, so she went and knocked on Sarah's bedroom window until Sarah let her in the house. She then went to sleep, and when she later awoke she felt pain in her vaginal and anal areas. Angela asked Laura and Sarah what had happened to her, and they told her that she had had sex with Ricky and his dad.

¶5 Laura later drove Angela to Angela's friend's house, where Angela began to cry and then called the police. An ambulance came and took Angela to the hospital, where she was examined by a nurse and questioned by the police.

¶6 The nurse who examined Angela testified that Angela had bruises all over her body, that she had a split lip, and that one of her eyebrows had been shaved off. She further testified that Angela could not sit normally because of her rectal pain. The nurse testified that Angela had tears to her vaginal and anal areas that indicated penetration, and that the tears were less than two days old. She testified that Angela's injuries were of a type that would generally heal within two or three days. The nurse further testified that she observed redness in Angela's vaginal area and her anal canal. The nurse also took cervical, vaginal and anal swabs from Angela, and recovered a pubic hair from Angela's cervix.

¶7 After the nurse examined Angela, Officer Karen Domagalski drove Angela around so she could identify the house where she was sexually assaulted. Officer Domagalski testified that Angela identified Hinojosa's house, and that she also identified Hinojosa when he came out of the house. The police later recovered Angela's sweatshirt from Hinojosa's bedroom.

¶8 The police performed enzyme tests on the cervical and vaginal swabs and on the underwear that Angela was wearing after the sexual assaults, and found semen on all three. They performed a DNA analysis of the semen from the vaginal swab and determined that the sample was consistent with Hinojosa's DNA sample. The DNA expert from the crime lab testified that, based on an FBI population database, one in 5,900 Hispanic persons would have DNA consistent with the DNA from the vaginal swab.

¶9 A jury convicted Hinojosa of second-degree sexual assault, and the trial court entered judgment accordingly. Thereafter, Hinojosa filed a postconviction motion raising the issues he argues on appeal. After a hearing, the trial court denied the motion.

DISCUSSION

A. Evidence of Angela's prior sexual conduct.

¶10 Hinojosa argues that the trial court erred in excluding evidence that Angela had had sexual intercourse two weeks before she went to the party at Hinojosa's house. He argues that the evidence was relevant and admissible because it would have provided an alternate explanation of the source of the injuries to Angela's vaginal and anal areas.[2]

[2] WISCONSIN STAT. § 972.11(2)(b) provides, in relevant part:

> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):

(continued)

¶11 Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. *See* ***State v. Larsen***, 165 Wis. 2d 316, 319–320, 477 N.W.2d 87, 88 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. *See* ***id.***, 165 Wis. 2d at 320 n.1, 477 N.W.2d at 89 n.1. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. *See* ***State v. McConnohie***, 113 Wis. 2d 362, 370, 334 N.W.2d 903, 907 (1983).

¶12 The trial court concluded that the proffered evidence of Angela's prior sexual conduct was not relevant because, according to the undisputed testimony of the nurse who examined Angela, Angela's injuries were no more than two or three days old. We agree. Indeed, the nurse testified that injuries like those that Angela had suffered usually heal within two or three days, and that Angela's injuries were less than two days old. Evidence that Angela had had sexual intercourse two weeks before the party at Hinojosa's would not have provided an explanation for Angela's injuries. The trial court did not erroneously exercise its discretion in excluding the proffered evidence.

B. Ineffective assistance of counsel.

¶13 Hinojosa also argues that he received ineffective assistance of trial counsel. Specifically, he asserts that trial counsel was ineffective because: (1) he did not assert a hearsay objection when an expert who did not perform the enzyme or DNA tests testified regarding the results of those tests; (2) he allegedly failed to

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> ….
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.

sufficiently cross-examine the expert regarding the reliability of the results of the DNA analysis; (3) he did not have independent tests performed on the evidence and did not have an independent expert review the results of the tests performed at the crime lab; (4) he did not assert a hearsay objection when Laura testified that, at the party, she heard that Angela had had sex with an older guy; (5) he did not object when Officer Domagalski testified that Angela told her enough details about the sexual assault to substantiate the offense; (6) he did not object to various portions of the prosecutor's closing argument; and (7) he did not file a pretrial motion seeking admission of evidence of Angela's prior sexual conduct.[3]

¶14 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant has not been denied effective assistance of counsel merely because he or she did not receive "the best counsel that might have tried the case, nor the best defense that might have been presented. 'Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***State v. Williquette***, 180

[3] The bulk of Hinojosa's appellate brief is a rambling account of the trial and postconviction proceedings without cogent argument or citation to legal authorities in support of the asserted claims of error. We have, nonetheless, attempted to identify the main issues that Hinojosa has raised, and we address only those issues. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424, 430 (1996) (appellate court need not address issues that "lack sufficient merit to warrant individual attention"); ***State v. Waste Management, Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

Wis. 2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 677, 526 N.W.2d 144 (1995). Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***Strickland***, 466 U.S. at 690. Counsel is strongly presumed to have rendered effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See* ***id.***

¶15 To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

¶16 Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

1. Expert testimony.

¶17 At trial, Ronald Witucki testified about the tests performed on Angela's underwear and the swabs that the nurse had taken at the hospital. Although he did not personally perform any of the tests, he explained both how the tests were generally performed and what the results were for the evidence submitted in Angela's case. Hinojosa argues that his counsel was ineffective in failing to object to Witucki's testimony.

¶18 Hinojosa has not established, however, that he was prejudiced by counsel's failure to object to Witucki's testimony. *See* ***Strickland***, 466 U.S. at 694. Indeed, had counsel objected to Witucki's testimony, the State could have obtained a continuance and presented the testimony of the persons who performed the tests, thereby eliminating counsel's argument that Witucki's testimony was unreliable because he did not perform the tests and did not know if they were performed properly. Significantly, Hinojosa provides no indication that he could have established that the tests were not properly performed if the persons who performed the tests had testified. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (to establish prejudice, "[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial"). We therefore reject Hinojosa's argument that trial counsel was ineffective in failing to object to Witucki's testimony.

2. Cross-examination.

¶19 Hinojosa also argues that trial counsel was ineffective because he allegedly failed to sufficiently cross-examine Witucki about the reliability of the DNA analysis. Among other things, he asserts that trial counsel "neglected to elicit the fact that DNA typing can only exclude a suspect and that "'inclusion' is just a probability number," and also "neglected to challenge the terms 'consistent' or 'match.'"

¶20 Contrary to Hinojosa's assertions, however, the record reveals that there was extensive testimony that DNA typing yields a probability determination of the likelihood that the sample came from a given person. Indeed, as noted, Witucki testified that one in 5,900 Hispanic persons would have a DNA pattern

consistent with Hinojosa's DNA pattern. Hinojosa's trial counsel repeatedly questioned Witucki on this probability calculation. Further, Hinojosa's trial counsel questioned Witucki as to whether "match" was "too strong a word to use for the similarities in the D.N.A. between the two samples?" Witucki responded that the word "match" meant that the "patterns were consistent with each other." Hinojosa's trial counsel then elicited testimony from Witucki that it is possible for DNA samples to have consistent patterns although they have originated from two different people. Hinojosa's assertion that he received ineffective assistance of counsel because his trial counsel did not adequately cross-examine Witucki is without merit.

3. Independent tests/independent expert.

¶21 Hinojosa argues that trial counsel was ineffective because he failed to have independent tests performed on the evidence collected from Angela, and he failed to have an independent expert review the results of the tests performed at the crime lab. Hinojosa fails, however, to establish that further testing would have resulted in exculpatory evidence, or that the opinion of an independent expert would have changed the outcome of his trial.[4] *See* ***id.*** (to establish prejudice, "[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial"). Hinojosa offers only his postconviction expert's opinion that the probability of finding another person with a DNA sample consistent with Hinojosa's would be closer to one in several

[4] As the trial court aptly noted at the postconviction hearing, Hinojosa's argument about the potential results of additional DNA testing is "purely speculative. This is not a situation where the defense has gone out and had any samples tested on its own and is coming in saying, … look at what it shows, this should have been done at the time of trial."

hundred, rather than one in 5,900.[5] There is no reasonable probability that this testimony would have changed the result of the trial.

¶22 There was compelling physical evidence in support of Angela's claim that she was sexually assaulted. The evidence further established that the sexual assault occurred in Hinojosa's bed, during a party at his house, at which Hinojosa admits he was present, and that the DNA of the sperm sample from Angela's vaginal swab was consistent with Hinojosa's DNA. Under these circumstances, the asserted difference in the probability of the DNA match does not render the result of Hinojosa's trial unreliable. Hinojosa has failed to establish that he was prejudiced by trial counsel's alleged deficiency. *See* ***Strickland***, 466 U.S. at 694.

4. Laura's testimony.

¶23 Hinojosa argues that trial counsel was ineffective in failing to object when Laura testified that, at the party, she heard that Angela had had sex with an older guy. He asserts that the testimony was inadmissible hearsay, and that it was prejudicial because the other evidence indicated that he was the only older person at the party.

¶24 The record reveals, however, that Laura's testimony was cumulative to other testimony, and was consistent with Hinojosa's theory of defense.

[5] Hinojosa's expert opined that Witucki's testimony that the probability of a match was one in 5,900 was based upon errors in the testing and calculation process, and that accurate calculations "would result in far less compelling evidence." Hinojosa's expert did not give a specific probability, other than his assertion that eliminating one alleged error in the calculation process "would by itself probably change the statistical ratio in the one to several hundred range." Thus, we limit our analysis to the numbers offered by Hinojosa's expert. Further analysis would be based on pure speculation.

Significantly, when cross-examining Angela, prior to Laura's testimony, Hinojosa's counsel elicited from Angela that she had discussed with Laura and Sarah what happened at the party, and that they had told her that "Ricky and his father" had had sex with her. He further elicited that Angela had told the police that "a younger man" and "an older man" had had sex with her at the party. Thereafter, trial counsel attempted to establish that Angela was unable to identify her assailants because she was unconscious during most of the party, and that she identified Hinojosa as one of the assailants based only upon unreliable rumors she had heard from others. Laura's testimony was consistent with trial counsel's reasonable, although ultimately unsuccessful, theory of defense. *See* ***Strickland***, 466 U.S. at 690 (counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct). We therefore conclude that Hinojosa's counsel was not ineffective in failing to object to Laura's testimony.

5. Officer Domagalski's testimony.

¶25 Hinojosa argues that trial counsel was ineffective in failing to object when Officer Domagalski testified that Angela gave her enough detail about the sexual assault to substantiate the offense. He asserts that the testimony was an impermissible comment on Angela's credibility. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984) ("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.").

¶26 Hinojosa's trial counsel asked Officer Domagalski, during cross-examination, "You indicated that Angela [T.] gave you a rather detailed description of this sexual assault?" Officer Domagalski answered, "She gave me enough details to substantiate the offense." This testimony clearly referred to the

level of detail Angela used in describing the sexual assault. It was not a statement of Officer Domagalski's personal belief in the truth of Angela's account of the offense. We therefore reject Hinojosa's argument that trial counsel was ineffective in failing to object to this testimony.

6. Closing argument.

¶27 Hinojosa argues that trial counsel was ineffective in failing to object to several portions of the prosecutor's closing argument. Specifically, Hinojosa asserts:

> [D]efense counsel erred in failing to object to the prosecution's closing [when]: (1) the prosecutor told the jury that the victim testified 'with credibility'; (2) the prosecutor vouched for the victim stating that she was 'honest about that'; (3) the prosecutor inferentially told the jury that Mr. Hinojosa's defense had failed because it had not explained certain aspects of the defense and accordingly asked the jury to speculate about certain evidence; and, (4) the prosecutor[] state[d], contrary to the testimony at trial that the DNA samples that were not tested were too small to be tested.

Brief of Defendant-Appellant at 28 (record references omitted).

¶28 First, the record reveals that the prosecutor's comments on Angela's credibility were neither improper nor unfairly prejudicial to Hinojosa. The Wisconsin Supreme Court "has rejected the strict rule against a prosecutor expressing an opinion based on the evidence." ***State v. Cydzik***, 60 Wis. 2d 683, 694, 211 N.W.2d 421, 428 (1973). "In Wisconsin, a prosecutor or a defense counsel may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors." ***Embry v. State***, 46 Wis. 2d 151, 160, 174 N.W.2d 521, 526 (1970). "However, when such an opinion is expressed it must be clear that it is based

solely upon the evidence in the case." ***Id.*** "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence … and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979).

¶29 After discussing the evidence that corroborated Angela's account of the sexual assaults and the circumstances under which Angela disclosed the sexual assaults, the prosecutor argued to the jury that Angela had "testified with credibility." Later, the prosecutor again urged the jury to find Angela's testimony credible, arguing, "She tells the truth, that she can't remember when she can't." These comments both properly urged the jury to find Angela credible based upon the evidence.[6]

¶30 Second, the record reveals that the prosecutor's evaluation of the strength of the defense did not improperly shift the burden of proof to the defense. The prosecutor merely pointed out that the testimony of the State's expert witnesses was undisputed, and that the defense had not provided expert testimony to support its contradictory theory.

¶31 Third, the prosecutor's statement that the anal swab was "too small of a sample to be tested for DNA," was a reasonable inference from the testimony of the crime lab witness, Witucki. Witucki testified that because DNA typing is a "very expensive and labor intensive test procedure," the crime lab normally tests

[6] Indeed, the prosecutor clarified during rebuttal closing argument that "it doesn't matter and I hope you don't take into consideration what I believe or what they [opposing counsel] believe, because the only thing that matters is what you believe, based on her [Angela's] testimony."

only "the best two possible candidates." The prosecutor then asked Witucki whether the sample from the anal swab was sufficient for testing, and Witucki responded that there were "only trace amounts of semen" on the anal swab. This testimony supports a reasonable inference that the crime lab decided not to test the sample from the anal swab because it was too small.

¶32 Finally, Hinojosa has failed to establish that he was unfairly prejudiced by any of the foregoing statements; none undermined the reliability of the trial. We therefore reject Hinojosa's argument that his counsel was ineffective in failing to object during the prosecutor's closing argument. *See* ***Strickland***, 466 U.S. at 694.

7. Pretrial motion.

¶33 Hinojosa argues that trial counsel was ineffective in failing to file a pretrial motion seeking the admission of evidence that Angela had had sexual intercourse two weeks before the party at his house.[7] As noted, the proffered testimony was not admissible. Hinojosa was thus not prejudiced by counsel's failure to file the motion.

C. Plain error.

¶34 Hinojosa asserts that each of the foregoing alleged errors constitutes plain error. If an error constitutes plain error and affects the defendant's

[7] WISCONSIN STAT. § 971.31(11) provides:

> (11) In actions under s. 940.225, 948.02, 948.025 or 948.095, evidence which is admissible under s. 972.11 (2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

substantial rights, the defendant's failure to object does not preclude our review of that error. *See* ***State v. Street***, 202 Wis. 2d 533, 552, 551 N.W.2d 830, 839 (Ct. App. 1996). In order to constitute plain error, an error must be obvious and substantial, and so fundamental that a new trial or other relief must be granted. *See* ***id.*** "'The plain-error rule is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right.'" ***Id.*** (citation omitted). We have already rejected Hinojosa's arguments with respect to each of the alleged errors. Hinojosa's assertions of plain error merely reiterate his previous arguments. They are without merit.

D. New trial in the interest of justice.

¶35 Finally, Hinojosa asserts that he is entitled to a new trial in the interests of justice. He asserts that the issue of whether he was properly identified as Angela's assailant was not fully tried because of trial counsel's alleged errors with respect to the DNA evidence.

¶36 WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

If we conclude that the real controversy has not been fully tried, we may grant a request for a new trial based upon that conclusion alone, *see* ***State v. Betterley***, 191 Wis. 2d 406, 424–425, 529 N.W.2d 216, 223 (1995); if we conclude that it is

probable that justice has miscarried, however, we must also determine that there is a substantial probability that that a new trial would produce a different result, *see* ***State v. Martinez***, 210 Wis. 2d 397, 403, 563 N.W.2d 922, 925 (Ct. App. 1997).

¶37 As noted, Hinojosa has failed to establish that the DNA testimony was unreliable or that further DNA testing would have yielded a different result. We therefore reject Hinojosa's assertion that he is 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.