COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP708-CR **Cir. Ct. No. 2012CF4739**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTYON R. TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Order reversed and cause remanded with directions*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Antyon Turner appeals a judgment of conviction and orders denying his motions for postconviction relief. He raises several claims of ineffective assistance of counsel. We conclude that an evidentiary hearing was

required on one of those claims. Therefore, we reverse the order denying the supplemental postconviction motion, and remand for a hearing.[1]

¶2 After a jury found Turner guilty, he was convicted of one count of first-degree sexual assault of a child. Further discussion of the facts is not necessary for this opinion, other than to say that the victim testified that, during a birthday party for an adult at her residence, Turner committed the charged crime with her in the living room and in the basement.

¶3 One claim in Turner's supplemental postconviction motion was that his trial counsel was ineffective. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the 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. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶4 Turner alleged that his trial counsel was ineffective by failing to sufficiently investigate five witnesses and call them at trial. The motion included affidavits by all five proposed witnesses. Four of the affiants averred that they attended the party. They each described their own actions at the party and their awareness of Turner's actions and locations during that time. One of the affiants averred that she lived in the lower unit at the same house and did not attend the party, but she would have known if someone had gone downstairs to the basement

[1] While Turner appeals from a judgment and an order, we address only one order for the reason set forth in the opinion.

and that her "dog [] would have barked." Turner argues that these witnesses would have undercut the State's case by showing that he did not commit the assault and did not go to the basement at any time during the party.

¶5 The circuit court denied the motion without an evidentiary hearing. The court concluded that there is no reasonable probability that Turner would have been acquitted if the witnesses had testified at trial. The court discussed each affidavit individually, and as to each affidavit the court identified one or more perceived flaws in the expected testimony that would have made the witness not credible or otherwise not strongly persuasive. In addition, the court wrote that the affidavits did not create a reasonable probability of acquittal in light of "the other strong evidence" against Turner.

¶6 A defendant is entitled to an evidentiary hearing if the motion alleges facts that, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). This is a question of law that we review without deference to the circuit court. ***Id.***

¶7 On appeal, Turner argues that the court's conclusion about prejudice was in error because the court misread or otherwise misunderstood some of the affidavits, and the court's description of some of them was incomplete and did not acknowledge particular statements in them that would have countered some of the flaws perceived by the court. We note that the State, in response, does not contest these arguments by Turner, and does not attempt to defend the circuit court's reading of the affidavits. Accordingly, we do not discuss the circuit court's analysis of them further, and we proceed on only the arguments made by the State on appeal.

¶8 The State argues that Turner failed to allege prejudice, in light of the strength of the evidence supporting the conviction. The State describes that evidence in detail, such as the victim's testimony about the assault, the forensic interview with the victim, and the sexual assault examination.

¶9 We regard the State's argument as incomplete, because the evidence supporting the conviction cannot be looked at in isolation, as we would do when reviewing sufficiency of the evidence. Instead, the State's evidence must be weighed, in a way that a jury might, against the other evidence that Turner now claims should also have been presented. Based on the averments in the affidavits, it appears that Turner's five witnesses would support a defense argument that Turner did not go to the basement at any time during the party, and that he was in public view for much or all of the time. This testimony would appear to conflict with the victim's account as to when and where the assault occurred. There is nothing about the proposed testimony that is inherently incredible or irrelevant. If a jury were to believe this testimony, the jury could reasonably have reasonable doubt about whether the assault occurred. Therefore, we conclude that Turner's allegations about the expected testimony are sufficient to allege prejudice, because if true, they could undermine confidence in the outcome of the first trial.

¶10 The State also argues that Turner's claim should be rejected because the record from the trial shows that he was involved in the decision not to call the five witnesses. The State's argument is based on a discussion that occurred on the first day of trial, before jury selection. Turner's attorney made a statement, "[j]ust as an offer of proof," in which he explained that Turner would be their main witness and would testify that he did not commit the assault. Counsel stated that there were also other potential witnesses who might say they were at the party, but counsel said he was concerned the jury might think they were motivated to help

Turner, that they did not have testimony helpful to the defense, and that counsel was not going to present them. After making this statement, counsel said to Turner, "I made that clear to you sir, correct?" Turner replied: "Correct."

¶11 Based on this exchange, the State now describes Turner as having "participated in" counsel's strategic choice, which was made "in consultation with Turner." We think the State vastly overstates the strength of the conclusion that can be drawn from Turner's one-word answer. All that can be taken with confidence from his answer is that counsel had previously conveyed similar information to Turner. Whether Turner participated in reaching the decision, or whether he even agreed with it, cannot be determined or even meaningfully speculated about from this answer. Therefore, even if we assume that the law provides that Turner's participation in or assent to counsel's decision would bar him from receiving an evidentiary hearing on this ineffective assistance claim, the current record does not show any basis on which to make that decision.

¶12 The State also asserts, as part of the above argument, that counsel's statement to the court "demonstrates that trial counsel had properly investigated what other potential witnesses would say." This assertion is similarly untenable. Counsel's statement to the court mentioned only one witness by name, and did not describe in detail what counsel believed the witnesses would testify to. Furthermore, counsel's statement of his factual belief at that time about the witnesses' expected testimony does not conclusively establish that counsel's belief was *correct*. Counsel, or counsel's investigator, may not have fully interviewed the witnesses, or could have misunderstood them.

¶13 For the above reasons, we conclude that Turner's supplemental postconviction motion makes allegations sufficient to obtain an evidentiary

hearing on the issue of the five witnesses. However, Turner also raised other issues on appeal that we now address.

¶14 All of Turner's additional arguments are based on claims of ineffective assistance made in his postconviction motions. In the first two claims, he claimed that counsel was ineffective by failing to raise hearsay objections to certain evidence. The first evidence was testimony about a text message a witness said she had received from the victim's mother saying that Turner had touched the victim, and the mother was going to the police. The second evidence was the same witness's testimony about what the victim had told the witness about the assault.

¶15 In Turner's third claim, he argues that counsel was ineffective by failing to impeach this same witness with testimony of another person, who would have testified to certain information about dates that would have undercut the above witness's testimony about the text message and the victim's account. As to all three of these claims, Turner argues that counsel's performance was prejudicial because the allegedly hearsay testimony had the effect of bolstering the credibility of the victim's testimony about the assault.

¶16 We conclude that Turner has not made a sufficient allegation of prejudice as to these claims. Even if we assume that hearsay evidence was unnecessarily admitted, and that the witness could have been better impeached, we are skeptical that this type of information would have a meaningful effect on a jury verdict. The jury had the opportunity to see the victim herself testify, and to see her recorded forensic statement. We expect that a jury would rely far more on its own perception of the victim than it would on these other pieces of corroborating

evidence, and therefore the fact that such corroboration occurred does not undermine our confidence in the outcome.

¶17 For the reasons discussed above, we reverse the order denying the supplemental postconviction motion and remand with directions to hold an evidentiary hearing on the claim regarding five witnesses.

By the Court.—Order reversed and cause remanded with directions.

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