COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1228-CR **Cir. Ct. No. 2012CF687**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNIE CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. A jury found Dannie Carter guilty of soliciting a child for prostitution and disorderly conduct. *See* WIS. STAT. §§ 948.08 and

947.01(1) (2013-14).[1] Carter seeks a new trial based on the ineffectiveness of his trial counsel. Because counsel's performance was not deficient, we affirm.

Background

¶2 At trial, R.L. testified that she and her younger brother, J.L., were lying on a couch in a back room of her house when Carter "came in the room, and then all [of a] sudden he started talking about me sucking his dick, and … like he would give me money if I have sex with him." Carter was "touching his body … in his genital area" and "licking his lips." Carter also told R.L. that he could "teach [her] some things" while R.L's mother was on an upcoming trip with Carter's wife. Carter was "licking his lips and everything" while he was saying that. R.L. testified she felt "scared" and "uncomfortable" with Carter's conduct. She went into a bathroom, locked the door, and telephoned her aunt. Carter followed R.L. to the bathroom, knocking "three or four times," asking R.L. what was wrong, and telling her he needed to use the bathroom.

¶3 R.L. testified that she was "crying" and "breathing hard" while she was talking to her aunt. Her aunt testified that R.L. was upset and cried for "like four or five minutes." Eventually, R.L. told her aunt that Carter was "bothering her," "asking her to suck his dick," and that she had locked herself in the bathroom. R.L.'s aunt contacted R.L.'s mother who called the police. R.L. stayed in the bathroom until her mother and the police arrived.

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

¶4 R.L. also testified that J.L. did not see Carter licking his lips because J.L. was sleeping. Carter was in the room for about five minutes before J.L. woke up and left the room. R.L. testified that when J.L. got up and went to the bathroom, Carter "stopped the conversation, and then, like, as soon as [J.L.] went out [of] the room, he started … the conversation back up again."

¶5 J.L. was twelve years old at the time of this incident. He did not testify at trial, and the failure to call him as a witness is the crux of this appeal. A police officer took a statement from J.L. shortly after the incident and that statement was included in the police reports provided to defense counsel prior to trial.

> [J.L.] told me that he had been in the back game room with his sister, [R.L.], today. He had just woken up from a nap when Dannie Carter had entered the game room where they were. Dannie asked them how it had been going for them at school today. They both told him what their days were like and what had been going on. [J.L.] got up to go to the bathroom. He had left his sister with Dannie. They were talking when he walked out of the room. He noticed that his sister seemed upset, but he wasn't sure why. A short time later, he returned from the bathroom and Dannie and [R.L.] were still talking in the game room. [R.L.] still looked upset and he thought she had mentioned something about being upset that her boyfriend had cheated on her. Right after [J.L.] had returned from the bathroom, [R.L.] immediately got up, left the room, and went into the bathroom locking the door. He could hear her crying in the bathroom. He stayed in the game room, however he noticed that Dannie had walked to the door of the bathroom and had been knocking on it. It sounded like he was trying to get [R.L.] to talk to him. That's what he does when he comes to their house, he talks to people and tried to help. Eventually his sister came out of the bathroom, however she had been in there for a long time. She had refused to come out and kept telling Dannie to go away. He doesn't think she came out at all until his mom and police showed up at their house.

Discussion

¶6 On appeal, Carter asserts that his trial attorney should have called J.L. to testify because he would have "directly contradicted" R.L.'s testimony.[2] Carter suggests that R.L.'s credibility would have been fatally impugned because J.L. did not mention that Carter had made any sexual statements despite J.L.'s presence in the room. In Carter's view, J.L.'s statement impeaches R.L.'s "testimony regarding what … Carter said and did upon entering the room, and the jury is left with no reasonable way to find Carter guilty under any standard, let alone beyond a reasonable doubt."

¶7 In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.***, ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶8 A court considering the performance prong of the test must assess the reasonableness of trial counsel's performance under the facts of the particular case, viewed as of the time of the counsel's conduct. *See* ***State v. Marcum***, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). We are not to second-guess

[2] Carter also faults trial counsel for not calling the police officer. However, the officer did appear at trial and testified that she took a statement from J.L. The officer was not questioned about the content of J.L.'s statement.

trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). The defense selected need not be the one that by hindsight looks best to us. *See* ***id.*** However, we will examine counsel's conduct to be sure it is more than just acting upon a whim; there must be deliberateness, caution, and circumspection. *See* ***id.*** "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Merely because a strategy was unsuccessful does not mean that counsel's performance was legally insufficient. *See* ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987).

¶9 At a ***Machner***[3] hearing, Carter's trial attorney explained that she viewed J.L. as a "neutral" witness who could not have refuted any allegation made by his sister. Counsel also stated that R.L.'s family was uncooperative with the defense and her investigator had been unable to talk with J.L. Counsel testified that she made the strategic decision not to put J.L. on the stand because of the family connection with R.L. and the uncooperativeness, and because, in her view, he could not testify to anything inculpatory or exculpatory. Counsel also testified that she viewed J.L. as "another witness corroborating that [R.L.] ran screaming and upset to the bathroom." Counsel testified that she attempted to discredit R.L.'s testimony through cross-examination and that she pointed out, in her closing argument, that the State did not introduce any evidence from J.L. that may have corroborated R.L.'s story.

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

¶10 J.L. did not testify at the ***Machner*** hearing. Beyond pointing to the statement made on the day of the incident, Carter does not inform this court what J.L. would have testified to if he had been called as a witness at trial.

¶11 The circuit court concluded that counsel's performance was not deficient. The court noted there was "substantial risk" in presenting any child witness, and here counsel "had a somewhat reluctant child witness with a reluctant family, who's a blood relative of a complaining witness." The court stated that questioning such a witness "could result in such a negative impression from the jury that the substance of what the witness says is far less important than the over all loss of trust of the jury." The court noted that counsel could reasonably conclude that J.L.'s statement to the police officer is not so inconsistent with R.L.'s testimony so as to outweigh the risk of calling an uncooperative child witness who is a blood relative of the complaining witness. The court also noted that J.L.'s testimony would reinforce R.L.'s testimony that she was upset and crying.

¶12 Counsel's decision not to call J.L. as a witness was a reasonable strategic decision. Counsel did not act "upon a whim," but rather after "deliberateness, caution, and circumspection." *See* ***Felton***, 110 Wis. 2d at 502. This court will not second-guess counsel's considered selection of trial tactics. *See* ***id.***

¶13 This case is distinguishable from ***State v. Jenkins***, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786. In ***Jenkins***, the failure to call a witness constituted deficient performance because the witness was an eyewitness to the crime and counsel knew the witness's testimony would impeach a key prosecution witness. ***Id.***, ¶¶42, 48. The record also showed no reasonable trial strategy for not calling

the witness. ***Id.***, ¶46. In this case, J.L.'s statement did not directly contradict R.L.'s testimony and, in fact, it supported and reinforced several aspects of R.L.'s account.[4] And, as we have seen, several strategic reasons supported the decision not to call J.L. as a witness.

¶14 Because the performance of trial counsel was not deficient, Carter received effective representation.[5] Therefore, we affirm the judgment of conviction and postconviction order.

By the Court.—Judgment and order affirmed.

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

[4] Carter argues that R.L. testified that Carter began sexually propositioning her immediately upon entering the room, and that such testimony is inconsistent with J.L.'s statement that Carter asked them about school when Carter first entered the room. Carter interprets R.L.'s testimony that Carter "came in the room, and then all the sudden" started propositioning her means that no other conversation preceded the proposition. Carter's argument is not persuasive. "All the sudden" is inherently ambiguous, lacking any temporal anchor or precision. It does not mean that Carter did not engage in other conversation before propositioning R.L. It is equally plausible that Carter chatted with the children, including the recently awakened J.L., and turned to the sexual propositions when J.L. left the room to use the bathroom. In a similar vein, J.L.'s statement to the police does not purport to be a verbatim account of the interview and, therefore, the chronology in the statement is far more imprecise than Carter suggests.

[5] This court need not address whether counsel's performance prejudiced Carter. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11 (this court may address either prong of the test for ineffective assistance of counsel and an inadequate showing on either prong defeats defendant's claim).