COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2180-CR **Cir. Ct. No. 2012CF538**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. MCCANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. James E. McCann appeals a judgment of conviction after a jury found him guilty of one count of first-degree child sexual assault (sexual contact with a child younger than 13) and one count of repeated sexual assault of the same child (at least three acts of first-degree sexual assault).

See WIS. STAT. §§ 948.02(1)(e) and 948.025(1)(d) (2009-10). In a postconviction motion for a new trial, McCann argued that his trial attorney was ineffective for not objecting to the verdict form and the jury instructions. The circuit court denied McCann's motion in an order that McCann also appeals. We affirm.

BACKGROUND

¶2 We first note that McCann does not challenge his conviction on Count 2, the repeated sexual assault of the same child. Therefore, we confine our discussion to Count 1 of the information, which alleged that McCann had sexual contact with E.K.V., a child younger than 13 years of age, "on or about June 17, 2012, to August 3, 2012."

¶3 E.K.V.'s testimony was presented to the jury through a videotaped interview with a police investigator. E.K.V. was six years old at the time of the interview. E.K.V. stated that McCann, who she referred to as Grandpa, put his hand on her private part while they were sitting together on his chair in the living room of McCann's house. E.K.V. said that McCann's hand was under her underwear and McCann was "just rubbing." E.K.V. said that she did not remember the first time that McCann touched her. She could not remember the last time that McCann touched her but "[i]t always happened in the living room." E.K.V. indicated that McCann touched her "[l]ike three times." When asked to describe the other incidents, E.K.V. indicated that she did not remember anything different about the other times. Later in the interview, when asked whether McCann had ever touched her in another room, E.K.V. confirmed that McCann touched her only while they were in the living room "two times" or "maybe three" times. The investigator asked E.K.V., "What makes you say it's either two or

three?" and E.K.V. said, "'Cause that's the last time I remember." When asked what she remembered about the "last time," E.K.V. replied, "Nothing."

DISCUSSION

¶4 McCann has a constitutional right to a unanimous verdict. *See* ***State v. Seymour***, 183 Wis. 2d 683, 694, 515 N.W.2d 874 (1994).

> A defendant may be denied the right to a unanimous jury verdict if (1) the prosecutor issues only one count but presents evidence of multiple crimes; or (2) the prosecutor issues only one count but introduces evidence of multiple acts that are not conceptually similar but each of which would be sufficient to constitute the criminal offense charged; and (3) with either alternative one or two above, the jurors do not unanimously agree which crime or acts the defendant committed.

State v. Tulley, 2001 WI App 236, ¶14, 248 Wis. 2d 505, 635 N.W.2d 807 (footnote omitted).

¶5 Because McCann did not object to either the verdict form or the jury instructions, we do not directly review whether the circuit court erred. *See* ***State v. Marcum***, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992). However, McCann raises an ineffective-assistance-of-counsel claim and, therefore, we review the issue in that context. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 408 n.14, 424 N.W.2d 672 (1988).

¶6 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690.

There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶7 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶8 Our standard for reviewing this claim involves a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127. Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial present a question of law, which we review de novo. ***Id.*** at 128. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶9 The jury was instructed that its "verdict must be reached unanimously.… [And] all 12 jurors must agree in order to arrive at a verdict." The verdict form asked whether McCann was guilty of first-degree sexual assault of a child "as charged in count one of the information." On appeal, McCann argues that his trial counsel deficiently failed to object to jury instructions and a verdict form that did not require the jurors to agree on which of the two or three incidents described by E.K.V. formed the basis for the conviction. In McCann's view, the instructions and form resulted in a guilty verdict that only informs us that the jurors agreed that McCann committed at least one act of sexual assault,

but we do not know whether the jurors unanimously agreed on one specific incident. McCann contends that trial counsel's failure to object was prejudicial because he was denied a unanimous verdict.

¶10 McCann relies on ***Marcum***, 166 Wis. 2d 908. In that case, the defendant was charged with six counts of sexual assault of a child. ***Id.*** at 912-13. Three of the counts in the information were phrased identically, and alleged that the defendant had sexual contact with a person younger than 13 years of age. ***Id.*** at 913. Those counts were drawn from the victim's preliminary hearing testimony where she described three distinct forms of sexual contact that occurred in September 1989—hand-to-vagina, penis-to-vagina, and penis-to-mouth. ***Id.*** at 912-13. The verdict forms for the three counts were virtually identical, each referring to September 1989 and the particular count number. ***Id.*** at 914-15.

¶11 The ***Marcum*** jurors heard confused and conflicting accounts of the assaults. The number of incidents that occurred during September was unclear, "sometimes described as occurring on two days and at other times as occurring on three days" and once arguably on a single day when they were described "simply as the 'last time' sexual contact occurred." ***Id.*** at 913. Additionally, there was also "confusion about what acts took place and on which occasion." ***Id.*** The victim's trial testimony indicated that the "last time" the defendant assaulted her there was only hand-to-vagina contact over her clothes. ***Id.*** at 914. The jury, however, also heard evidence of the victim's initial statement to a detective in which she described that three acts occurred during the "last time" in September—hand-to-vagina, hand-to-breast, and penis-to-vagina. ***Id.***

¶12 Trial counsel did not object when the court gave the standard jury instruction on unanimity. ***Id.*** at 917-18. The jury found the defendant guilty on

one of the three counts related to September and not guilty on the other two. ***Id.*** at 915.

¶13 We determined that Marcum's right to a unanimous verdict was violated because "we do not know which of the several alleged acts led to his conviction on count six. Nor do we know which acts the jury acquitted him of in counts four and five." ***Id.*** at 919. Like the present case, Marcum's arguments were raised in an ineffective-assistance-of-counsel context, and we concluded that Marcum was prejudiced by counsel's failure to object to the verdict forms and the instructions because it is not known which act Marcum was convicted of and because his guilty verdict could have been based upon an act for which the jury found him not guilty. *See* ***id.*** at 925.

¶14 In contrast to ***Marcum***, the evidence that the jury heard in this case was simple and straightforward. E.K.V. testified that McCann did the same thing—rubbed his hand on her private parts under her underwear while seated in the living room—whether it was the "first," second, or "last" time. E.K.V. testified that McCann touched her on more than one occasion, but he was charged with only a single count of sexual assault. We agree with the following analysis made by the State in its brief:

> Proof of all three assaults depended solely on the credibility of [E.K.V.]. No reasonable jury could have found her credible when she mentioned the additional assaults but incredible when she detailed the first sexual assault. If the jury believed [E.K.V.], as they obviously did, they believed that McCann assaulted her the time she described in detail in her interview.
>
> … [N]o reasonable jury could have found that the second or third assaults occurred without also finding that the first assault occurred because the evidence supporting the second and third assaults was the evidence elicited in regard to the first assault.…

> Since [E.K.V.] said that all the assaults were the same, the jury had no basis for picking and choosing. If they found that the second or third identical assault occurred, they logically had to find that the first assault occurred.

(Citation omitted.)

¶15 In light of the evidence before the jury, we conclude that McCann's right to a unanimous verdict was not violated. Therefore, McCann's trial counsel was not ineffective.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).