COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP118-CR **Cir. Ct. No. 2012CF97**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EVERETT SENNHOLZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. After a four-day trial, the jury found Everett Sennholz guilty of four counts of sexual assault of a child under thirteen, in

violation of WIS. STAT. § 948.02(1) (2013-14).[1] The victim was his granddaughter E.M. The assaults occurred over two decades ago from the time E.M. was eight years old until she was twelve when she and her sisters lived with their grandparents. Sennholz alleges that his conviction resulted from numerous errors defense counsel made at trial. We disagree and affirm the judgment of conviction and the order denying his motion for postconviction relief.

¶2 To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and prejudicial to the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Deficient conduct is prejudicial if "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." ***Strickland***, 466 U.S. at 694.

¶3 Whether the right to the effective assistance of counsel has been denied presents a mixed question of law and fact. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. Findings of historical fact will not be disturbed unless they are clearly erroneous. ***Id.*** The ultimate determinations of whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to independent review. ***Id.*** We conclude that the

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

postconviction court's findings are not clearly erroneous and that counsel's performance was not constitutionally deficient.

Alleged Expiration of Statute of Limitations

¶4 Violations of WIS. STAT. § 948.02(1) are covered by the special statute of limitations for certain crimes against children committed on or after July 1, 1989. *See* WIS. STAT. § 939.74(2)(c); *see also* 1987 Wis. Act 332, §§ 27, 66a. Count one alleged an assault occurring between September 1 and November 24, 1989. E.M.'s birthdate is November 25, 1980. Sennholz contends counsel should have moved to dismiss it on statute-of-limitations grounds because the evidence did not establish that the crime occurred on or after July 1, 1989. At the close of the State's case, counsel moved generally to dismiss all counts based on insufficient evidence but conceded at the ***Machner***[2] hearing that he had no strategic reason for not specifically moving to dismiss count one.

¶5 The court found that the count one assault fell within the statute of limitations because, based on E.M.'s testimony, it occurred when she was eight, it could have been in 1989 because she was eight until November 25, 1989, it was in the fall because there were leaves on the ground and she wore a jacket as it was chilly, and it occurred over Thanksgiving break. We take judicial notice that Thanksgiving 1989 was on November 23. Regardless of the lack of a strategic reason for not moving to dismiss count one, counsel was not deficient since, having found no statute of limitations issue, the court would have denied the motion. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647

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

N.W.2d 441 (no deficiency in not raising issue with no merit). Therefore, Sennholz's related claim for resentencing based on a dismissal of count one also fails.

*Alleged **Haseltine** Violation*

¶6 Pleasant Prairie police detective Randy Myles, the lead investigator, testified that when E.M. reported the assaults in 2010, he initially was "in disbelief" given how many years had passed. He testified that his job is to find the truth, and not take one side over another, and that, after further conversation with E.M. to get a "gut feeling" about her, she seemed "very believable, very truthful, and genuinely upset." Counsel should have objected to that testimony, Sennholz argues, because no witness may give an opinion as to whether another competent witness is telling the truth. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Counsel could not recall Myles's testimony in this regard or state a reason for not objecting.

¶7 The court found that Myles was not vouching for E.M.'s veracity but, per his standard evaluation of a complainant's report, he assessed whether there was some basis for filing a complaint and merely deemed E.M.'s account and demeanor to be sufficiently reliable to warrant further investigation. Without a reason to object, the failure to do so was not deficient performance.

Alleged Improper Comment on Right Against Self-Incrimination

¶8 Sennholz argues Myles impermissibly commented on his pre-arrest silence. The right to pre-***Miranda***[3] silence is derived from the privilege against

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

compelled self-incrimination. ***State v. Adams***, 221 Wis. 2d 1, 9, 584 N.W.2d 695 (Ct. App. 1998). The privilege does not arise absent circumstances that might compel a reasonable person to speak and incriminate himself or herself. ***Id.*** The test is whether the language was "manifestly intended or … of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." ***State v. Nielsen***, 2001 WI App 192, ¶32, 247 Wis. 2d 466, 634 N.W.2d 325. Whether a defendant's right to remain silent was violated involves the application of constitutional principles to undisputed facts that we review de novo. ***Id.***

¶9 Myles first contacted Sennholz at home. At trial, the prosecutor asked Myles whether Sennholz was willing to speak to him at that time. Myles responded:

> He wasn't willing to speak—I mean, I went to his house and I explained who I was and why I was there and I said, you know, there's an allegation of a sexual assault and he wasn't surprised. I thought it was kind of odd. And I'm like, well, I'd like to talk to you about this and I'd like you to—so I don't have to take notes, it would be nice if you come to the police department where I can record it and that way we can just talk and I'm not trying to interrupt because I don't write very fast and I type slower than I write and then that was the end of that conversation.

Sennholz went in the next day accompanied by his wife.

¶10 Counsel testified that he did not think the first statement ("He wasn't willing to speak") was objectionable and that he did not hear the second ("[H]e wasn't surprised. I thought it was kind of odd"). The court found that Myles simply misspoke when he said Sennholz "wasn't willing to speak" and promptly corrected himself; that Sennholz was not coerced to make a statement, as he voluntarily presented himself at the police station, was not under arrest, was

interviewed with the door open and his wife present; and that his willingness to talk—in essence "I'm willing to talk to the police 'cause I know it's not true"—was helpful to the defense. We conclude that Myles's statements were neither intended nor were such that the jury would naturally and necessarily take them to be an improper comment on Sennholz's right to silence.

Allegedly Improper Closing Argument

¶11 The prosecutor wound up her rebuttal closing argument as follows:

> Smoke, mirrors. This is—this is what we do. This is what an attorney has to do when there's just nothing. There's nothing. And there is nothing. There's no defense here. He's guilty. And, again, in continuation of 26 years, he is trying to avoid responsibility for it some more. And I am begging you; don't let him get away with it another day longer.

Sennholz contends counsel should have objected because it improperly stated a personal opinion as to his guilt or innocence. *See* SCR 20:3.4(e); ***State v. Jackson***, 2007 WI App 145, ¶22, 302 Wis. 2d 766, 735 N.W.2d 178.

¶12 Counsel testified that, absent a complete misstatement of the evidence, his general policy is to not object during closing arguments, which he believes jurors view unfavorably. The court found that counsel, an experienced trial lawyer, made a reasonable strategic decision and that "99%" of the prosecutor's argument was devoted to the facts, evidence, and strength of the case.

¶13 We conclude that saying "He's guilty" and "begging" the jury to so find was not improper. It merely was a comment on the substantial evidence, which included Sennholz's admission to E.M. in a 2010 conversation she secretly recorded. The prosecutor's remarks did not "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Wolff***, 171

Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted). Not objecting was not deficient performance.

Admission of Alleged Hearsay Statements

¶14 Sennholz's attorney did not object to the admission of notes E.M. and Kelli S. exchanged in junior high in 1995 or to testimony about conversations about the notes. The notes, some read into evidence, implicated Sennholz in the sexual assaults. Sennholz contends they are inadmissible hearsay under ***State v. Peters***, 166 Wis. 2d 168, 178-81, 479 N.W.2d 198 (Ct. App. 1991). The State contends no objection was warranted as the communications were sufficiently trustworthy to be admissible as a residual hearsay exception. *See* WIS. STAT. §§ 908.03(24) and 908.045(6). Counsel testified he thought the evidence was admissible. The court found that counsel was not deficient for not objecting because the notes "fit[] in" as a residual hearsay exception.

¶15 We agree with the court that counsel's failure to object was not deficient performance. The letters between friends disclosed the sexual abuse while it was ongoing and in an effort to put an end to it. The circumstances evidence guarantees of trustworthiness and there is no suggestion of a plan of falsification—to falsely allege sexual abuse years later. Both E.M. and Kelli testified, so that the notes' trustworthiness and reliability could be probed during their direct and cross-examinations.

¶16 Even if counsel should have objected, Sennholz has not proved prejudice. *See* ***Johnson***, 153 Wis. 2d at 127. Given E.M.'s testimony about the repeated assaults and that in 2002 Sennholz "apologized, and he said if he could go back and change it, he would"; the testimony of her sister, S.G., that she saw

Sennholz and E.M. engaged in a sexual act; and Sennholz's tape-recorded admission, the alleged hearsay was unnecessary to convict him.

Failure to Draft Other-Acts Cautionary Instruction

¶17 To establish the context of E.M.'s and Sennholz's relationship, the State introduced through E.M.'s testimony evidence of sexual assaults outside of those in the charging documents. Sennholz contends counsel should have either requested an other-acts jury instruction regarding those events or objected when the court gave an other-acts instruction only in regard to another witness, another of Sennholz's granddaughters who testified that he also sexually assaulted her.

¶18 Counsel testified, and the court found, that he strategically decided not to push for an other-acts instruction vis-à-vis E.M. because the defense theory was that she fabricated *all* claims, charged or not. Reviewing the performance from counsel's perspective at the time of trial, *see* ***id.***, we decline to second-guess counsel's considered selection of trial tactics, *see* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

Alleged Error in Failure to Impeach S.G.

¶19 The State introduced S.G.'s testimony to bolster E.M.'s claims. S.G. testified that E.M. seemed to be Sennholz's favorite; if their grandmother did not go along when the family went up north to their cabin, E.M. slept in the bed with Sennholz; only E.M. was allowed to go down to the basement where Sennholz's office was; and, more than once, S.G. sneaked down the basement steps and observed E.M. and Sennholz engaged in sexual activity. S.G. testified that she recognized "something with … the two of them … was not right" because her stepfather had sexually abused her. S.G. also testified that she did not recall if her

stepfather was found guilty, but remembered that he returned home to live with her mother and she went to live with her sisters at her grandparents'.

¶20 Sennholz contends counsel should have impeached S.G.'s credibility with evidence counsel possessed that S.G.'s stepfather was acquitted of the sexual assault charge. Counsel testified that he believed S.G.'s testimony that her stepfather returned home sufficiently addressed it. The court found that S.G.'s testimony gave the jury an "independent indication" that he was not convicted. The failure to impeach S.G. does not undermine our confidence in the outcome.

Reversal in the Interest of Justice

¶21 Finally, Sennholz contends that the cumulative effect of the alleged errors demands a reversal of his conviction in the interest of justice. WISCONSIN STAT. § 752.35 permits this court to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." This discretionary reversal is reserved for "exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶22 Given the overwhelming evidence of Sennholz's guilt, this is not such a case. The court found that E.M.'s trial testimony and Sennholz's recorded admission were "most damaging" and specifically found E.M.'s testimony and defense counsel's ***Machner*** hearing testimony to be credible. As Sennholz's call for a reversal rests on contentions we already have rejected, we decline to order a new trial. *See* ***State v. Arredondo***, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 674 N.W.2d 647 (Ct. App. 2003).

By the Court.—Judgment and order affirmed.

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