COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2036-CR **Cir. Ct. No. 2012CF132**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY JOE HOFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Timothy Hoff appeals a judgment convicting him, after a jury trial, of four felonies and two misdemeanors, as well as an order denying his postconviction motion. On appeal, Hoff argues that his trial counsel rendered ineffective assistance of counsel. He also challenges the sufficiency of

the evidence to support his conviction for one count of exposing a child to harmful material, contrary to WIS. STAT. § 948.11(2)(a) (2011-12).[1] For the reasons set forth below, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Hoff was charged with four sexual crimes involving his girlfriend's daughter who was eight years old at the time of the crimes charged. Hoff and his girlfriend lived together, and the child stayed at their residence on weekends. The child told police that Hoff sexually assaulted her at the residence. Police searched the residence and found drug paraphernalia and synthetic cannabinoid. Hoff was charged with first-degree sexual assault of a child, causing a child to view sexual activity, exposing his genitals to a child, exposing a child to harmful material, bail jumping, possession of synthetic cannabinoid, and possession of drug paraphernalia.

¶3 At Hoff's trial, the majority of the video recording of the child's interview by police officer Emilee Nottestad was played for the jury. The child testified at trial. Hoff also testified at trial, and denied sexually assaulting the child, showing her his genitals, or showing her pornography. The circuit court dismissed the count of possession of a synthetic cannabinoid before jury deliberation. The jury returned a guilty verdict as to each of the remaining six crimes. Hoff was convicted and sentenced. He filed a postconviction motion requesting a new trial and the entry of an order vacating his conviction for

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

exposing a child to harmful material. The circuit court denied the motion after a hearing, and Hoff now appeals.

DISCUSSION

¶4 Hoff argues on appeal, as he did in his postconviction motion, that his trial counsel was ineffective for failing to object to the admission of the video recording of the child's interview, for not eliciting expert testimony about the child's interview, and for not cross-examining the child more extensively at trial. Hoff also challenges the sufficiency of the evidence to support his conviction for exposing a child to harmful material. We will address each of these arguments in turn.

Ineffective assistance of counsel

¶5 A claim of ineffective assistance of counsel requires the defendant to show both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Id.*** at 698. We will not set aside the circuit court's factual findings about what actions counsel took, or the reasons for those actions, unless the findings are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

¶6 Here, Hoff argues that his counsel rendered ineffective assistance in a number of ways. We first address his argument that his counsel was ineffective for failing to object to the admission of the video recording of the child's interview

by Officer Nottestad. Hoff argues that his counsel should have objected on the basis that the State did not comply with the ten-day notice requirement of WIS. STAT. § 908.08(2)(a) for admitting an audiovisual recording of a child. He also asserts that the child's statements did not comply with the requirement under WIS. STAT. § 908.08(3) that the statements be "made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth." For the reasons discussed below, we reject these arguments.

¶7 When the State moved to admit the video recording of the child's interview a day before trial, defense counsel stated that he would object to some portions of the video, but not others. Defense counsel also stated that he would speak to Hoff about the State's failure to give ten days' notice regarding the video. The next day, the circuit court asked the parties before trial if they had reached an agreement about the video. The parties confirmed that they had stipulated that all but a small portion of the video would be played. Defense counsel stated that he had spoken with Hoff regarding the possibility of objecting, but that it was the "defense's strategic position" not to oppose entry of the video into evidence. Defense counsel also informed the court that he had possessed a copy of the transcript of the video's contents for about a year and a half and was familiar with it. The court admitted the video and it was played for the jury during the trial, with the exception of the short portion that the parties had agreed would not be played.

¶8 Defense counsel testified at the postconviction motion hearing that, in this case, the video evidence may have been less compelling than live testimony, given the tendency of a jury to sympathize with a child witness.

Counsel also testified that he believed the video was going to be admitted even if he objected. This belief is consistent with ***State v. Snider***, 2003 WI App 172, ¶¶16-19, 266 Wis. 2d 830, 668 N.W.2d 784, in which this court concluded that WIS. STAT. § 908.08(7) permits the admission of a child's videotaped statement under any applicable hearsay exception, including the residual hearsay exception, regardless of whether the requirements of WIS. STAT. § 908.08(2) and (3) have been met.

¶9 Here, the circuit court observed in its oral ruling on the postconviction motion that the child's statement did not appear to be the product of adult manipulation, that the child showed age-appropriate knowledge, that the statement was made "a short time since the assault," that the child did not show any "signs of deceit or falsity," and that the child's description of a sex toy like one found in a closet where the child said it was located corroborated her statement, thus satisfying the ***Snider*** factors for admissibility of the video under the residual hearsay exception. *See* ***Snider***, 266 Wis. 2d 830, ¶17. Given all of these facts, we arrive at the conclusion, as did the circuit court, that the video would have been admissible under WIS. STAT. § 908.03(24) even if defense counsel had objected to it. Accordingly, we are satisfied that the decision of Hoff's counsel not to object to the video recording was a reasonable strategy and not deficient performance.

¶10 We turn next to Hoff's argument that his counsel rendered ineffective assistance by failing to present expert testimony at trial to critique the interview techniques used with the child. At the postconviction motion hearing, the defense's expert opined that the oath the child was given during her interview with Officer Nottestad was insufficient. However, the record demonstrates that Officer Nottestad confirmed with the child during the interview that the child

understood the difference between the truth and a lie. The child also affirmed that she knew it was important to tell the truth. The child then went on to further describe Hoff's actions. At trial, the child again affirmed that she understood the difference between the truth and a lie, that she knew she had to tell Officer Nottestad the truth, and that she would not have told Officer Nottestad something that was not true. Given these facts, even without expert analysis, we are satisfied that the record demonstrates that the child understood the importance of telling the truth and that false statements are punishable, as required by WIS. STAT. § 908.08(3). Accordingly, we are satisfied that the decision not to retain an expert to challenge Officer Nottestad's interview techniques was within the realm of reasonable strategic decisions and was not deficient performance.

¶11 Hoff also asserts that his counsel's failure to cross-examine the child more extensively at trial amounted to ineffective assistance of counsel. Hoff asserts that his trial counsel should have explored certain inconsistencies and weaknesses in the child's account of what happened. In her videotaped interview with Officer Nottestad, the child stated at one point that Hoff *tried* to make her lick his penis. Hoff suggests that this statement is inconsistent with the child's later statement that Hoff would "make" her lick his penis. Also in the video, the child stated that, on the evening prior to the interview, Hoff was watching "this weird show" and that she could see it. Hoff argues that this statement conflicts with a purported statement by the child's mother that Hoff did not watch anything on television that night that was inappropriate for the child to see. Hoff also points out that, when asked by Officer Nottestad whether her mother was ever home when the sexual behavior was occurring, the child responded "[n]ot really." Hoff argues that his trial counsel should have cross-examined the child about this vague

answer and also should have asked follow-up questions about the contents of the videos allegedly played in the child's presence.

¶12 However, Hoff does not explain how cross-examining the child about these matters would have helped his defense. We agree with the State's argument that, if counsel had asked the child for more detail, her answers may have hurt the defense by revealing more about Hoff's actions and painting him in a more negative light. In addition, defense counsel testified at the postconviction motion hearing that, with a child victim, there is potential to alienate the jury if the child is questioned in too aggressive a manner. Defense counsel did not want to be seen as "beating up on a little girl metaphorically." Defense counsel also testified that his philosophy was not to have the witness retell the whole story. We are satisfied that these strategies were reasonable, and were not deficient performance, given the age of the victim and the nature of the allegations against Hoff.

Sufficiency of the evidence

¶13 We turn next to Hoff's argument that the evidence was insufficient to support his conviction for exposing a child to harmful material. To prove Hoff guilty of exposing a child to harmful material, the State needed to prove that Hoff knowingly exhibited or played harmful material to the child. *See* WIS. STAT. § 948.11(2)(a) and WIS JI—CRIMINAL 2142. "Harmful material," for purposes of this case, means a movie of a person or portion of the human body that depicts nudity or sexually explicit conduct and that is harmful to children. WIS JI—CRIMINAL 2142.

¶14 Hoff argued in his postconviction motion that "[t]he implication at trial was that videos found in defendant's residence were hardcore pornography."

He asserted that no one testified that the videos contained hardcore pornography or that Hoff played those specific videos for the child. Hoff argued that the child stated in her videotaped interview only that she observed videos of adults with their private areas showing, and gave similar testimony at trial. Hoff argued that the mere act of showing a child a video that has one or more naked persons in it is not a violation of WIS. STAT. § 948.11(2)(a).

¶15 The circuit court rejected Hoff's arguments, acknowledging that no one testified at trial about the exact content of the videos, but concluding that "the jury could make reasonable inferences from all of the evidence presented … and find that the defendant knowingly played harmful material to a child and that all of the elements of Count 4 were met." Hoff argues on appeal that the circuit court's conclusion was incorrect because the jury did not have a specific movie to review to assess its contents. He further argues that the record does not contain a factual basis for determining that the movie in question was "harmful material" under WIS. STAT. § 948.11(2)(a). We disagree.

¶16 When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Here, the record contains evidence, in the form of the child's statements to Officer Nottestad and the child's testimony at trial, that Hoff showed her videos depicting unclothed adults with their "private areas" showing. The child told Officer Nottestad that Hoff said it was a "secret" and not to tell her mother. The child also stated that when Hoff showed her the videos, Hoff would pull down his pants and underwear

and touch himself in his private area. The child stated that Hoff knew she was not supposed to be watching the videos. A police officer testified at trial that a search of Hoff's bedroom revealed pornographic DVDs. Photos of the covers of the DVDs were shown to the jury. Hoff also admitted at trial that the videos found in his bedroom were pornographic.

¶17 From the record, a reasonable jury could have believed the child's testimony that Hoff showed pornographic videos to her. The jury also could have inferred that the videos Hoff showed to the child were the ones found in his bedroom or, if not those specific videos, then videos of a similar nature. The child's statement that Hoff would pull down his pants and underwear and touch his private parts while watching the videos, along with his admonition that the child not tell her mother, supports a reasonable inference that Hoff knowingly showed the child harmful materials that depicted nudity and were harmful to children. Accordingly, we are satisfied that the evidence is sufficient to support Hoff's conviction for exposing a child to harmful material, contrary to WIS. STAT. § 948.11(2)(a), such that the circuit court properly denied his postconviction motion.

By the Court.—Judgment and order affirmed.

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