COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2113-CR **Cir. Ct. No. 2013CF222**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES KENNETH DALLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: JAMES J. DUVALL, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Charles Dallman appeals a judgment convicting him of repeated sexual assault of the same child and incest. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel and requested a new trial in the interest of justice. He argues:

(1) his counsel was ineffective for telling the jury three times in his opening statement that Dallman would testify, but Dallman later decided not to testify; and (2) the real controversy was not fully tried, thereby entitling Dallman to a new trial in the interest of justice, because Dallman did not knowingly waive his right to testify. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The child victim testified that Dallman had sexual contact or intercourse with her on numerous occasions. She testified one of the assaults took place at 10:00 p.m. on Thanksgiving night, 2013. The victim and her mother, Dallman's ex-wife, testified there was a bump or skin tag on Dallman's penis. When Dallman was interviewed by police, he told an officer he would "concede" if the victim could describe a skin tag on his penis, but he then backed away from the statement, saying he was sure she could not describe it.

¶3 In his opening statement, Dallman's attorney made three statements that are the basis for this appeal: (1) "You will hear him testify about where he went;" (2) "Mr. Dallman is going to testify about this particular day here. This is the day [the victim's] second interview she specifically says something happened on this day at 10:00 at night. The testimony I am going to present to you is that could not have happened;" and (3) "She says he has a skin tag on his penis. He doesn't. He will testify to that." Dallman contends his counsel was ineffective for "promising" that he would testify regarding his activities on Thanksgiving Day, 2013, and the absence of any skin tag on his penis.

¶4 At the postconviction hearing, Dallman's trial counsel testified he and Dallman agreed before the trial began that Dallman would testify. Counsel testified they discussed Dallman's testimony at least twice and "talked about that

at length in subsequent meetings in terms of prepping him how to be in front of a jury, how to handle answering questions, sort of not volunteering what is being asked." Counsel advised Dallman to "keep it simple." Based on Dallman's initial decision to testify and their preparation for his testimony, counsel told the jury in his opening statement what Dallman would say. Counsel testified Dallman changed his mind and informed counsel he did not want to testify after the defense presented several witnesses. Counsel testified, "I didn't even ask him. He volunteered that to me."

¶5 Dallman and his brother testified at the postconviction hearing that counsel told Dallman it was not in his best interest to testify because counsel was afraid Dallman would be "tripped up" by cross-examination. The court rejected that testimony, finding more credible counsel's testimony that Dallman "volunteered" he did not want to testify.

¶6 The circuit court denied the postconviction motion, concluding Dallman failed to establish deficient performance from his counsel's opening statements that Dallman would testify. The court noted its colloquy with Dallman, in which Dallman indicated he understood it was his decision not to testify, not his attorney's, and he was making the decision freely and voluntarily. Although there was no testimony that Dallman was warned of the danger of negative inferences the jury might draw from his failure to testify, the court concluded Dallman was in a position to make his own decision because he was present during the opening statements and was capable of deciding for himself if there was a risk of the jury drawing negative inferences from his change of mind about testifying.

¶7 The court also found no prejudice to Dallman's defense arising from Dallman's decision not to testify because his activities and whereabouts on

Thanksgiving Day, 2013, were established by other witnesses. The court also concluded Dallman's testimony that he had no skin tag on his penis would not have persuaded the jury because it was contradicted by his own statement to an investigating officer.

DISCUSSION

¶8 Whether a defendant received ineffective assistance of counsel is a question of constitutional fact. ***State v. Dillard***, 2014 WI 123, ¶86, 358 Wis. 2d 543, 859 N.W.2d 44. We uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** We independently determine whether those historical facts demonstrate that defense counsel's performance met the constitutional standard for ineffective assistance of counsel. ***Id.*** To establish ineffective assistance of counsel, Dallman must show both deficient performance and prejudice to his defense. See ***Strickland v. Washington***, 466 U.S. 668, 678 (1984). The reasonableness of counsel's action may be determined or substantially influenced by the defendant's own statements or actions. ***Id.*** at 691. To establish prejudice, Dallman must show 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 that undermines our confidence in the outcome. ***Id.***

¶9 Dallman fails to establish deficient performance from his counsel's opening statements that Dallman would testify. Based on Dallman's pretrial decision that he would testify and their preparation for his testimony, counsel was justified in relying on Dallman to follow through with that decision. The circuit court's finding that Dallman changed his mind without any prompting from counsel is not clearly erroneous, as it was based on the circuit court's assessment of the witnesses' credibility. We defer to the circuit court's assessment of witness

credibility. *See* ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736.

¶10 Dallman cites ***State v. Coleman***, 2010 WI App 38, ¶30, 362 Wis. 2d 447, 865 N.W.2d 190, and cases from other jurisdictions, that collectively hold that an attorney performed deficiently by reneging on an opening statement promise that the defendant would testify. However, these cases are factually distinguishable because the attorney's statements were not sound trial strategy at the time they were made. In ***Coleman***, counsel told the jury Coleman would testify even though he knew Coleman did not want to testify and never said he would. ***Id.***, ¶31. Likewise, in the cases from other jurisdictions, counsel had reason to believe the defendant would not testify, or counsel advised the defendant not to testify after promising the jury he would. ***Ouber v. Guarino***, 293 F.3d 19, 27 (1st Cir. 2002); ***Williams v. Woodford***, 859 F. Supp. 2d 1154, 1164 (E.D. Cal. 2012). Because Dallman's counsel expected Dallman would testify based on their previous conversations, had no reason to doubt that Dallman would testify, and did not urge him to change his mind about testifying, the cases Dallman cites are inapposite.

¶11 As in ***State v. Krancki***, 2014 WI App 80, ¶10, 355 Wis. 2d 305, 851 N.W.2d 824, counsel's opening statement that Dallman would testify did not constitute deficient performance. The rules of professional responsibility required counsel to abide by Dallman's decision,[1] which was Dallman's alone to make, and counsel could not be ineffective for complying with his ethical obligation to abide by Dallman's decision. Dallman knew his attorney told the jury he would testify,

[1] Supreme Court Rule 20:1.2(a)

yet he chose not to after hearing the evidence against him. He cannot now complain that counsel's actions, which followed and reflected Dallman's own choices, amounted to ineffective assistance. ***Id.***, ¶11. Dallman contends an attorney cannot know for certain whether his client will testify and, therefore, "[i]t is not a reasonable strategy to promise the defendant will testify in an opening statement." If Dallman is advocating a per se rule, this court implicitly rejected such a rule in ***Krancki***. ***Id.***

¶12 Dallman faults his trial counsel for failing to explain to the jury why he did not testify. He does not specify how such an explanation could have taken place or what counsel should have said. In any event, it would be reasonable for counsel not to call attention to his unfulfilled "promise" to the jury.

¶13 Finally, Dallman has not established any basis for a new trial in the interest of justice. His argument that the controversy was not fully tried is based on the same arguments regarding counsel's opening statement. To the extent Dallman suggests the case was not fully tried because Dallman did not testify, that choice was his. When a defendant elects not to testify, he cannot be heard to complain that the jury did not hear his side of the story. ***Id.***, ¶11.

¶14 Dallman contends he did not knowingly waive his right to testify because no one warned him about the negative impact the "broken promise" could have on the jury. As the circuit court noted, Dallman was present during his counsel's opening statement. He elected not to testify knowing that decision was inconsistent with counsel's statement. Dallman cites no authority for the proposition that any additional warning is required.

By the Court.—Judgment and order affirmed.

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