COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1652-CR | **Cir. Ct. No. 2002CF471**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAXWELL J. VERKUILEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON and BRADLEY J. PRIEBE, Judges. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Maxwell Verkuilen appeals a judgment of conviction for two counts of third-degree sexual assault and an order denying his

motion for postconviction relief.[1] Verkuilen alleges ineffective assistance of counsel, that it was error for the court to send a specific diagram to the jury during deliberations, and that justice has been miscarried and we should use our discretionary power of reversal. We conclude that Verkuilen has shown, on at least one point, ineffective assistance of counsel. This is sufficient for us to reverse and remand the cause for a new trial.

Background

¶2 On June 11, 2002, Erin Schubert reported to the Kaukauna Police Department that she had been sexually assaulted that morning. She said she and her friends had gone to a bar the night before and, while there, she met Verkuilen. At some time after 2 a.m., she took Verkuilen from the bar back to his home.

¶3 At Verkuilen's home, Schubert went inside with him and they initially only watched television. They began kissing and Verkuilen touched her breasts, but stopped when she directed him to do so. Later, they went upstairs to Verkuilen's bedroom where Schubert alleges she was assaulted. She reported that over the course of an hour, Verkuilen performed oral sex on her and engaged in both vaginal and anal intercourse, all without her consent and causing her pain. She and Verkuilen eventually redressed and he walked her to his door, at which point she ran to her car and headed home.

¶4 After making her report to the police, Schubert was transported to the Appleton Medical Center, where she was examined by Jean Coopman, a

[1] The Honorable James T. Bayorgeon presided over the trial; the Honorable Bradley J. Priebe presided over the postconviction motion.

registered nurse who is also a certified sexual assault nurse examiner (SANE). Coopman documented approximately twenty-two injuries in six vaginal and anal areas.

¶5 Following the exam, a criminal complaint was filed on June 14, 2002, charging Verkuilen with two counts of third-degree sexual assault. At trial in August 2003, Coopman testified that Schubert's injuries were consistent with nonconsensual sexual assault and that she could think of no other explanation that would account for the injuries. Verkuilen testified on his own behalf, professing his innocence and stating that his sexual relations with Schubert were entirely consensual.

¶6 The jury convicted Verkuilen of both counts. He was sentenced in February 2004 to three years' initial confinement and six years' extended supervision on the first count, concurrent with four years' initial confinement and six years' extended supervision on the second count.

¶7 On January 19, 2005, Verkuilen filed a postconviction motion, seeking a new trial on the basis of multiple errors. The court denied the motion and Verkuilen appeals, alleging multiple errors constituting ineffective assistance of counsel. These errors include failure to: call an expert to rebut Coopman's testimony; ask for a ***Shiffra***[2] hearing regarding Schubert's use of the drug Zoloft; subpoena a character witness against Schubert; rebut the State's evidence about "rape trauma syndrome;" strike a juror for cause; and object to references to a statement of Verkuilen's. Verkuilen also alleges the trial court erred by applying

[2] ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

an incorrect standard of review to his ineffective assistance arguments and by sending the State's diagram of Schubert's injuries to the jury room during deliberations. Finally, Verkuilen asserts justice has been miscarried and calls upon us to use our discretionary power of reversal. We conclude counsel's failure to call a witness to rebut Coopman constituted ineffective assistance entitling Verkuilen to a new trial. Accordingly, we reverse on that basis.

Discussion

Standard of Review

¶8 Wisconsin applies the ***Strickland***[3] test to ineffective assistance of counsel claims. ***State v. Demmerly***, 2006 WI App 181 ¶20, 722 N.W.2d 585. In order to establish ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Id.*** To prove deficient performance, the defendant must show specific acts or omissions were "outside the range of professionally competent assistance." ***State v. Marshall***, 2002 WI App 73, ¶5, 251 Wis. 2d 408, 642 N.W.2d 571 (citation omitted). To prove prejudice, a defendant must demonstrate 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." ***Demmerly***, 722 N.W.2d 585, ¶20. The focus of this inquiry is on the reliability of the proceedings, not on the trial's outcome. ***State v. Roberson***, 2006 WI 80, ¶29, 292 Wis. 2d 280, 717 N.W.2d 111.

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[3] ***Strickland v. Washington***, 466 U.S. 668 (1984).

¶9 An ineffective assistance of counsel claim presents a mixed question of law and fact. ***Demmerly***, 722 N.W.2d 585, ¶21. We will not overturn the trial court's factual findings unless clearly erroneous. ***Id.*** Whether counsel was deficient and whether the defendant was prejudiced are questions of law we review de novo. ***Id.***

¶10 Verkuilen alleged the court placed too high a burden on him at the postconviction hearing, forcing him to prove that there "necessarily" would have been a different result but for counsel's errors instead of a reasonable probability. We perceive Verkuilen to have taken the court's comments out of context. However, even if the court applied an incorrect standard, because we review the ultimate questions of deficiency and prejudice de novo, we are able to cure any error the court may have made in selecting the burden of proof without necessarily having to reverse.

Ineffective Assistance of Counsel

¶11 Coopman, the sexual assault nurse examiner, identified for the jury the injuries she documented on Schubert. Ultimately, the State asked her if she could "think of anything else that can cause this mass of injuries other than nonconsenting sexual intercourse?" Coopman answered, "No, I can't." Verkuilen complains it was ineffective assistance of counsel when his attorney failed to call a rebuttal expert because Coopman essentially "testified to the ultimate issue the jury was to determine—whether the sexual encounter was consensual, or forced."

¶12 At the postconviction hearing Verkuilen presented testimony from Maureen Van Dinter, a nurse practitioner who teaches at the University of Wisconsin School of Medicine. Van Dinter teaches the proper method for performing sexual assault examinations and reviewed the police reports, intake

reports, Coopman's notes, and a transcript of Coopman's testimony. Van Dinter testified about several inconsistencies in the records. She noted that a "wet prep" test revealed no bacteria, semen, parasites, or blood on a vaginal swab. She challenged Schubert's testimony of significant vaginal bleeding, because Schubert had not reported that symptom on her pre-exam form and Coopman had not documented any bleeding. Van Dinter also proffered alternate explanations for some of Schubert's injuries. Ultimately, Van Dinter testified there was no way to say, to any degree of scientific certainty, that Schubert's injuries were the result of nonconsensual sex. Rather, she testified that the injuries could be consistent with consensual intercourse, although she could not completely rule out nonconsensual sex.

¶13 At the postconviction hearing, Verkuilen's trial counsel also testified. He conceded he did not "seek an expert witness, SANE type of nurse…." Rather, he stated he had consulted a nurse with whom he had worked on other cases.[4] He asked her whether Schubert's injuries could have been caused in some other manner, such as if some time had passed since her last sexual encounter or if Verkuilen had a larger than average penis. The nurse had told counsel that some of the alternate theories were plausible, but that she could not exclude nonconsensual sex as a source of the injuries.

¶14 Thus, the attorney testified, he considered it unwise to call this nurse because he was concerned he would "end up with another person testifying, just reaffirming, confirming the State's conclusions, the State witness conclusion

[4] We take umbrage at Verkuilen's representation that counsel did not "crack open a book" for his case. This implies counsel did no research. Counsel testified that his preparation in this case was based on his experience with prior similar cases.

there." Asked why he did not seek another expert, the attorney replied that he did not want to give the impression he kept calling witnesses until he found one who would testify favorably for Verkuilen. Rather, he called someone on whom he relied in the past and based his decision on her opinion. The problem, however, is that the attorney knew Coopman would say the encounter was nonconsensual and produced nothing contradictory other than Verkuilen's own protestation of innocence despite knowing the alternate theories were considered plausible.[5]

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[5] It is not entirely clear what the attorney expected Coopman to say at trial. Verkuilen's record cite pinpoints a question asking counsel if he recalled how Coopman testified, not what he expected her to say. The State asserts the attorney anticipated its witness would testify the sex could have been consensual or nonconsensual. Its record citation is to the following exchange:

> Q: What did you discuss [with the nurse]?
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> A: That issue that I discussed with her went to the vaginal and anal tears that were identified and whether or not this was a sign of perhaps lack of consent or a sign that a combination of things, that this woman had not had sex for a long period of time, that the other person involved in this case … had a larger than average penis, and those are the possibilities I explored.
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> Q: And in your contact with this nurse was she able to give you anything that you felt usable at trial?
>
> A: Well, she indicated as I recall that that could be consistent with that, that what I proposed is consistent with what I've described but said it was-- I don't recall what she said precisely, but she made it clear that the other conclusion was just as possible. And my concern was I end up with another person testifying, just reaffirming, confirming the State's conclusions, the State witness conclusion there.

We conclude this exchange does not suggest the attorney anticipated Coopman would testify about the possibility of consent. Rather, the nurse he consulted agreed with his theory that Schubert's injuries could be from consensual sex with unusual circumstances, but also advised him that the "other conclusion"—the State's conclusion of assault and what the attorney anticipated from Coopman—was just as likely. Thus, the attorney was concerned that the nurse, in addition to supporting Verkuilen's theory of defense, would also end up bolstering the State's case. He did not expect Coopman to testify that both consensual and nonconsensual sex could account for Schubert's injuries.

¶15 The State responds that Verkuilen was not prejudiced because the number of Schubert's injuries corroborated the version of events to which she testified, Verkuilen's credibility was already damaged because of evidence of nine prior but unrelated convictions, and "[a]ny expert … would merely establish a possibility of consensual sex." The State's argument is unavailing. Because it relied on the number and type of injuries as self-explanatory, prima facie evidence of an assault and relied on those injuries to support Schubert's complaint, Coopman's testimony was not merely cumulative but a key component in the State's case.

¶16 Thus, it appears that the failure to call an expert to rebut Coopman effectively stripped Verkuilen of any defense. Coopman essentially rendered impossible Verkuilen's claim the sex was consensual. An expert witness such as Van Dinter, who could testify there might be another explanation for the injuries even if she also conceded the State's expert could be correct, would have at least offered the jury an alternate scientific or medical basis for acquittal. Counsel's failure to find such an expert essentially conceded the case before Verkuilen ever took the stand. We are not advocating "witness shopping" but counsel knew, from speaking with his own nurse, that there was some plausibility to his alternate theories. Thus, he could have sought an expert who would have made a better witness. Indeed, postconviction counsel seemed to have no difficulty locating Van Dinter.

¶17 This is not a case of mere witness credibility, as it would be with only Verkuilen and Schubert testifying, nor is it a case of competing experts—both circumstances under which we would defer to the credibility determinations of the fact-finder. Rather, we have a case where an expert's testimony,

unchallenged by the defense, essentially allowed the State to scientifically "prove" its complaining witness was telling the truth. This is deficient performance.[6]

¶18 Of course, we cannot say that, had a jury heard rebuttal evidence, there would have been reasonable doubt. We can only say that the failure to rebut Coopman's testimony, in light of the knowledge that she would testify the sex was nonconsensual, was enough of an error to undermine our confidence in the result.[7] Accordingly, we must reverse for a new trial, and we do so on that ground. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases decided on narrowest possible ground).

By the Court.—Judgment and order reversed and cause remanded.

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

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[6] We are mindful of that fact that we make this decision with only a paper record. We have no doubt that counsel perceived his choices to be appropriate at the time. They simply do not withstand review.

[7] We are also concerned about the failure to rebut Coopman's testimony because Van Dinter identified flaws in the exam methodology and Coopman's scientific basis for her opinions. This further undermines our confidence in the result at trial. For example, Van Dinter criticized the anatomical diagrams produced because she could not determine the scale used. One of the documented lacerations appeared, on the diagram, to be listed as 1.5 centimeters deep. Van Dinter testified that a wound that deep would indicate significant trauma and would likely require sutures, but Schubert received no stitches. Rather, Van Dinter surmised that the diagram was supposed to indicate length. Additionally, it was difficult for Van Dinter to tell what tools were used to obtain measurements and whether parts of the exam were done under magnification.

(continued)

Van Dinter also criticized Coopman's reliance on a journal article, which Coopman used as a basis for concluding the number of injuries indicated assault. Van Dinter stated the article had been based on the anecdotal evidence of two cases reviewed by the author. Thus, the article was limited in content and, according to Van Dinter, "would not be accepted at all under current medical standards as something that could be relied upon in fact."