COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1073-CR **Cir. Ct. No. 99-CF-77**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY A. DOXTATOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed*.

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

¶1 PER CURIAM. Terry Doxtator appeals a judgment convicting him of having sexual contact with his girlfriend's eleven-year-old babysitter, J.C. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. Doxtator argues that his trial counsel was ineffective in five respects: (1) counsel failed to impeach J.C. with her prior

juvenile delinquency adjudications and failed to show that she initially lied when she was accused of stealing a camera from the home where she babysat; (2) counsel failed to present evidence of the camera theft to show J.C.'s revenge motive for falsely accusing Doxtator; (3) counsel failed to inform the jury of J.C.'s sister's prior false allegation of sexual assault against another man to show that J.C. believed there would be no adverse consequences from making a false accusation; (4) counsel failed to introduce evidence of an alternative source of J.C.'s knowledge of vulgar words; and (5) counsel failed to prevent the jury from hearing of Doxtator's drinking habits and the fact that he did not have a high school diploma, a driver's license or his own car. We reject these arguments and affirm the judgment and order.

¶2 J.C. testified that Doxtator sexually assaulted her on two occasions. On November 12, 1998, J.C. was sleeping on the couch when Doxtator came downstairs, "grabbed [her] butt and then started playing with [her] hair." Doxtator then left and J.C. did not report the incident.

¶3 J.C. testified that approximately one week later, Doxtator again came downstairs, grabbed her butt and "put his finger in [her] butt with [her] shorts on." After he went back upstairs, she went upstairs to the children's bedroom and laid on their bed. Doxtator then entered the room and again grabbed her butt, put his head near her vagina and said "Baby, can I lick your pussy?" J.C. testified that she had never heard those types of words before. Doxtator then began licking her thigh until she demanded, "Get the fuck off me, you bitch." Doxtator then left the room and came back a short time later, grabbed her butt again and apologized for having touched her before. When Doxtator left the room, J.C. went down to the garage and used a cell phone in the car to call her mother at approximately 5 a.m.

¶4 J.C.'s mother testified that J.C. was upset and crying when she called. J.C.'s mother went to the house and picked up her daughter, tried unsuccessfully to awaken Doxtator or his girlfriend and then took her daughter to the police station to report the sexual assaults. When asked about use of vulgar language in her home, she responded "no, well, my older boys, I mean, you know, they talk, but not like that where -- ." Her answer was then interrupted by another question.

¶5 The jury acquitted Doxtator of having sexual contact with J.C. on November 12. It convicted him of having sexual contact with her one week later, but acquitted him of the charge that he penetrated her with his finger on the second occasion.

¶6 To establish ineffective assistance of counsel, Doxtator must show that his counsel's performance was deficient in a manner that prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Professionally competent assistance of counsel encompasses a wide range of behaviors. ***Id.*** at 689. Doxtator must show that his counsel's representation fell below an objective standard of reasonableness. *See* ***id.*** at 688. This court does not "look to what would have been ideal, but rather to what amounts to reasonably effective representation." *See* ***State v. McMahon***, 168 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, Doxtator must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694. A reasonable probability is one that undermines this court's confidence in the outcome. ***Id.***

¶7 Doxtator has not established deficient performance or prejudice from his trial attorney's failure to impeach J.C. with her juvenile adjudications and her initial lies when confronted about stealing the camera. Counsel succeeded in persuading the jury to acquit Doxtator on two of the three charges. Counsel effectively cross-examined J.C. with inconsistencies in her statements and the implausibility of aspects of her testimony. As the trial court noted, it is not unusual to identify areas of inquiry after trial that could have been done differently. Counsel's performance is not constitutionally deficient merely because counsel could have informed the jury that Doxtator's accuser had delinquency adjudications.

¶8 Counsel's failure to establish that J.C. initially lied when confronted with the camera theft does not undermine this court's confidence in the outcome of the trial. That a child would initially lie when confronted with wrongdoing is not remarkable and has little bearing on J.C.'s credibility in this matter. The circumstances of her reporting the touching and her emotional state at that time lend credibility to her testimony regardless of whether she lied about other matters.

¶9 Doxtator has not established deficient performance or prejudice from his counsel's failure to introduce the camera theft for the purpose of showing J.C.'s motive for making a false report. The trial court indicated that it would not have allowed that testimony. Counsel is not ineffective for failing to offer inadmissible testimony. *See* ***State v. Behnke***, 203 Wis. 2d 43, 63, 553 N.W.2d 265 (Ct. App. 1996). Furthermore, the theory that J.C. might have sought revenge for being confronted about stealing the camera by falsely accusing her accuser's boyfriend of sexual assault strains logic and is not supported by factual evidence. It is not clear from the record whether the camera was stolen before or after the

sexual assault allegations. If it was after the allegations, it could not have provided a motive for falsely accusing Doxtator. If the camera was stolen before the allegations, there was no indication that J.C. sought revenge for the accusation inasmuch as she continued to babysit for Doxtator's girlfriend after the theft was discovered. Therefore, the contention that the camera theft might relate to J.C.'s motivation for a false charge against Doxtator is not persuasive, and counsel's failure to pursue that line of defense was neither deficient nor prejudicial.

¶10 Likewise, Doxtator has not established deficient performance or prejudice from counsel's failure to attempt to inform the jury that J.C.'s sister made a false allegation of sexual assault against her mother's boyfriend. Doxtator contends that this evidence would have established that J.C. knew she could make a false accusation without suffering any consequences. Again, the trial court indicated that it would not have allowed that testimony had it been offered. The record does not disclose that J.C. was aware of her sister's false accusation. Her mother did not believe that J.C. was aware of it. The trial court would have properly excluded evidence of J.C.'s sister's allegedly false accusation because the matter was substantially irrelevant and would have necessitated a time consuming and confusing trial within a trial to determine the truth of the matter. Again, counsel cannot be faulted for failing to present inadmissible evidence.

¶11 Doxtator next challenges his counsel's failure to establish that J.C. had a different source of knowing vulgar words other than Doxtator's statements during the sexual assault. Doxtator contends that J.C.'s family, not Doxtator, accounts for her source of "sexual knowledge." While J.C. testified that she had not heard a particular vulgar word before, by her own testimony she used other vulgar words that she did not attribute to Doxtator. Her mother's testimony suggested that J.C. might have been exposed to these words when she lived with

her father or by hearing her brothers use those words. In his closing argument, Doxtator's counsel effectively argued that J.C.'s use of these words did not suggest that she learned them from Doxtator. Furthermore, J.C.'s statement that Doxtator asked "can I lick your pussy" merely provided her complete version of the circumstances of the offense. Doxtator was never charged with attempting oral intercourse with her. The source of her knowledge of that terminology is not particularly related to the allegation that Doxtator touched her buttocks. J.C. was eleven years old at the time of the offense. There was never any contention that she did not know what her butt was. The source of her knowledge of vulgar language is not directly related to the offenses charged, and counsel adequately presented the evidence and argument that Doxtator was not the source of her knowledge of these words.

¶12 Doxtator next faults his attorney for allowing evidence of Doxtator's drinking habits, his lack of a high school diploma, a car or a driver's license. He contends that knowledge of this information painted him as a "bad person." Doxtator's degree of intoxication was relevant to determine whether he could remember the incidents. His trial counsel utilized his drinking on other occasions to show that even when intoxicated, he did not sexually assault J.C. Utilizing this evidence constitutes a reasonable trial strategy that is virtually unchallengeable on appeal. *See* ***Strickland***, 466 U.S. at 690.

¶13 Doxtator correctly notes that unfairness attaches when the evidence appeals to the jury's sympathies, arouses a sense of horror, or otherwise causes the jury to base its decision on extraneous considerations. *See* ***State v. Patricia A. M.***, 176 Wis. 2d 542, 554, 500 N.W.2d 289 (1993). None of this challenged evidence fits that description. None of these matters was related to the crime and they were

not of such a nature to hold Doxtator up to contempt or ridicule. The jury's knowledge of these matters does not undermine our confidence in the outcome.

By the Court.—Judgment and order affirmed.

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