COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1191-CR **Cir. Ct. No. 2005CF266**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAZORUS LIDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Lazorus Lidell appeals from the judgment entered following a bench trial convicting him of first-degree sexual assault of a child, *see*

WIS. STAT. § 948.02(1), and incest with a child, *see* WIS. STAT. § 948.06(1).[1] He also appeals the order denying his postconviction motion alleging that his trial lawyer gave him ineffective assistance. We affirm.

I.

¶2 In January of 2005, eight-year-old S.L. told her school-bus driver that she had a "nasty" secret—that her uncle had "humped her." When interviewed by police, S.L. said that her Uncle (Lidell) "climbed on top of her and started 'humping her'" one time between September of 2003 and November of 2004, while she was living with her grandmother, who was also Lidell's mother. Lidell and an adult cousin also lived in the home.

¶3 S.L. then told police that Lidell had hurt her when he touched her with "his thing" (meaning his penis) in her vaginal area. Lidell was arrested. He denied the incident happened. He waived a jury and the case was tried by the court.

¶4 At trial, the parties stipulated to the place of the S.L. incident, its date and time span. They also stipulated to S.L.'s date of birth and her relationship to Lidell. S.L., the only witness for the State, testified that one night while she was getting ready for bed, Lidell took his clothes and her pajamas off so they were both naked as they lay on a couch on the first floor. S.L. then demonstrated with anatomical dolls how Lidell got on top of her and was rubbing

[1] The defendant testified at the trial that he spells his name "Liddell." The court records on appeal, however, spell his name with one "d": "Lidell." We thus use the spelling as it exists in the Record, without meaning any disrespect to the defendant.

his penis against her vagina. She also testified that she told her school-bus driver what Lidell had done to her.

¶5 Lidell was the only witness for the defense, and he denied assaulting S.L.: "I never touched her at all…. I never been alone with the kid." The trial court found Lidell guilty, opining that S.L. was more credible than Lidell:

> She testified today, at the age of eight. She indicated that this took place when she was six years old, … identifie[d] the defendant as her natural uncle, and that … an incident took place on the first floor of this two-story home, on a couch, and that … she was on that couch in her pajamas, … was approached by the defendant, who took off her clothes … and took off his clothes, and … humped on top of her.
>
> She demonstrated with the dolls the behavior … herself laying down, unclothed, on her back, and the defendant laying on top of her, unclothed, and the genitals of the defendant touching those of … the victim, which would constitute sexual contact.
>
> And her description of experiencing physical pain is also consistent with that description and that behavior.
>
> Now, the evidence supports that she told a bus driver … after … she was told by the defendant not to tell anyone, or she would get in trouble.
>
> Now, telling a bus driver is … somewhat unique … but we have a situation, here, where the child resides with the defendant, who is not going to come to her aid … and his mother, who is very dependent on the defendant as her source of care and assistance.
>
> ….
>
> Now, the defendant's testimony[:] … he acknowledges that this is his niece, that he does not have much of a relationship with her, other than to [say hello], he lives in the same household with her for this … one-year period … they must have had a great deal of contact with one another, because the defendant doesn't really do a whole lot outside of the household, by his testimony.

He testified that he was never alone with her, and he never saw her in pajamas, two things that I find rather hard to accept.

….

And never to be alone with her, clearly, the … defendant … is at home a lot. His mother is not capable of getting up and moving around and being in whatever room she desires without assistance, and his cousin [who lives there], who is employed full time, can't be there all the time.

So it doesn't also make sense that they would never be in the same room together alone.

He testified further that … the lights were always on in the house … that his … cousin lived on the couch on the first floor, and that all … three bedrooms, for himself, his mother, … and his niece were upstairs ….

The child testified that … she didn't cry, she didn't make any particularly loud noise that would be heard by the mother upstairs in a separate bedroom, the grandmother.

There's … been nothing in the record that shows any -- motive to falsify. There's no bias that has been indicated. There's no history of an adverse relationship between the two that might create some basis upon which bias could be inferred.

….

The defendant has one prior conviction, which the Court considers as an issue of credibility, but … of more importance is … the basically incredible nature of his testimony.

He's never alone, the lights are never out, his cousin has no life whatsoever, he does nothing but work … goes -- in the morning and comes back at the same time every, single day. That just doesn't sound like the life of anybody -- any other adults that I know in the world.

And that … [h]is disabled mother is always there to be a witness, even though she can't get around without assistance.

… Clearly, there was opportunity here that he's not acknowledging, and his … unwillingness to acknowledge

> that there could have been an opportunity, I find very suspicious.
>
> I think that that does speak to his credibility, and I think that he has tried to create a situation which would insulate him from [these] accusations by saying that there's simply never been an opportunity, and I just don't find that to be credible.
>
> It seems contrived, it does not seem believable, and frankly, in his presentation, it didn't seem believable.
>
> So for all those reasons, I do find that the child is the more credible witness, and the testimony, between the stipulations that have been provided and the testimony of the child, clearly meets every element of the two charges that have been [made].

¶6 After judgment, Lidell filed a postconviction motion claiming that his trial lawyer was ineffective, and asking for a new trial in the interests of justice. He argued that his lawyer should have: (1) cross-examined S.L. on fifteen alleged inconsistencies in a pre-trial videotaped interview she gave and her testimony at the preliminary examination and at the trial; (2) introduced the videotaped interview of S.L. at trial; and (3) called Lidell's mother and cousin to bolster his testimony.[2] At the hearing held pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (where the trial court determines whether a lawyer gave a defendant constitutionally ineffective representation), Lidell's trial lawyer testified that the defense strategy was to focus on the act itself and not on every detail, because S.L. was so young. He further explained why he did not call Lidell's mother and cousin to testify—he testified that he believed that neither were credible witnesses and that they would not have added anything to

[2] Lidell does not challenge the failure to introduce the videotaped interview in this appeal.

the defense. The trial court found that Lidell did not prove his lawyer was ineffective.

II.

A. *Ineffective Assistance: Alleged Inconsistencies.*

¶7 Lidell lists fifteen alleged inconsistencies in S.L.'s testimony, which he argues his lawyer should have asked about during S.L.'s cross-examination at trial. He claims that this was ineffective assistance. We consider each in turn.

¶8 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show 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." ***Id.***, 466 U.S. at 694. We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697. An ineffective-assistance-of-counsel claim presents mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A trial court's findings of fact will be upheld unless clearly erroneous. ***Ibid.*** Whether the lawyer's performance was deficient, and if so,

prejudicial, are questions of law we review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848.

1. "S.L. testified at trial that Mr. Lidell took her pajamas off of her. At the preliminary hearing, S.L. testified that she took her own pajamas off at Mr. Lidell's direction." (Record citations omitted.)

¶9 Lidell is correct that this is an inconsistency. At the preliminary examination, S.L. was asked how her clothes came off. She said: "He told me take them off." At the trial, she was asked "how did your pajamas come off?" She responded, "He took 'em off." Although her testimony differed, there is no reasonable probability that confronting S.L. with this discrepancy affected the trial's reliability. As the trial court found: "there was much in the testimony of the child that remained very consistent." S.L. never wavered on two facts: that the assault occurred and that Lidell was the one who "humped" her.

2. "At trial, S.L testified that Mr. Lidell was not wearing a shirt, pants, or underpants. At the preliminary hearing, S.L. testified that when Mr. Lidell lay on top of her, he was wearing all of his clothes." (Record citations omitted.)

¶10 Again, Lidell is correct that S.L. testified differently regarding whether Lidell was wearing clothes. At the preliminary examination, when asked "When he laid on top of you, was he wearing his clothes?" she answered "Yes." But at trial, when asked "was [sic] his clothes on or off when he got on top of you?" she answered "Off."

¶11 Again, not cross-examining on this difference was not prejudicial. At the preliminary examination, immediately after the clothes testimony, S.L. testified that while Lidell was "on top of [her]" "[h]e put his thing in my thing." Whether or not Lidell was clothed, S.L.'s testimony about the assault remained consistent. Thus, questioning her about this inconsistency in her testimony, given

her age and the time between the assault and the testimony, did not make the result of the trial unreliable.

3. "At trial, when asked who else was in the house, S.L. testified that her grandmother, Miss Lidell, was present. At the preliminary hearing, when asked the same question – who else was home S.L. testified that 'My grandma was there and Uncle Smilely was there,' and that they were upstairs, asleep." (Record citations omitted.)

¶12 Lidell's contention, however, as the trial court found, is not accurate:

> The defense also alleges that the child was inconsistent in her testimony about who was home during the assault. A closer review of the questions and answers does not support this allegation. At the Preliminary Hearing the child testified that her Grandmother and uncle were home and upstairs at the time of the assault. At trial, she testified that her grandmother was home but was never asked about her uncle.

(Record citation omitted.) Lidell has not shown that his lawyer did not adequately cross-examine S.L. on who was home during the assault.

4. "At trial, S.L. testified that she was six years old when the assault occurred. On the DVD recorded interview, S.L. stated that she was seven years old when assaulted, then six years old, and then stated that the assault occurred about one week ago." *(Record citations omitted.)*

¶13 When asked at the ***Machner*** hearing why he did not raise these inconsistencies, Lidell's lawyer explained that "young children" are not good with "dates and times" and "it's very difficult for them to – to put it all together." The trial court acknowledged that "children do not perceive or relate information in the same manner as adults," and that a defense strategy of "attacking inconsistencies, especially about time, dates or ages would not be … productive." We agree. Not cross-examining S.L. on these matters did not make the result of the trial unreliable.

5. "At trial, S.L. testified that she only told her bus driver what happened. In the DVD recorded interview, S.L. stated that she told her grandmother, her mom, and the bus driver." (Record citations omitted.)

¶14 At the trial, during direct-examination, S.L. was asked: "did you tell anybody on the bus what happened?" In the recorded interview she was asked: "Did you tell anybody what [happened]? These questions drew different responses because they were phrased differently. Also during direct-examination at trial, S.L. was asked: "Is there a reason you didn't tell your grandma what happened?" to which she responded "No." But at this point in the testimony she had not been asked if she told anyone at home, or if she told her grandmother. In essence, the answer was literally true because she could have answered "No" to that question because she *did* tell her grandmother. Later, during cross-examination, Lidell's lawyer said to S.L.: "you never told your mom." S.L. answered: "Yes." There was no follow-up by the lawyer to clarify whether S.L.'s answer meant "yes, I told my mom" or "yes, I never told my mom." The same thing happened with the question about her grandmother. Lidell's lawyer asked: "Never told your grandparent." And, S.L. answered "No." It appeared even the lawyer was unsure whether that "No" meant she had never told her grandmother or it meant "no—the statement is wrong, I did tell my grandmother," because he followed up with "No, correct?" to which S.L. said "Yes." In any event, Lidell has not demonstrated that anything his lawyer did or did not do in connection with these matters made the result of the trial unreliable.

6. "At trial, when describing the offense, S.L. testified that she felt pain and asked Mr. Lidell to stop. In the DVD recorded interview, when asked whether it hurt, S.L. nodded her head but denied saying anything and denied telling Mr. Lidell to stop." (Record citations omitted.)

¶15 As Lidell's lawyer explained at the ***Machner*** hearing, "it's not uncommon … for young victims [who are] involved in sexual assaults to make inconsistent statements." This is especially understandable when the first statement was made on January 14, 2005 and the other was made July 14, 2006. And, once again, whether she told him he was hurting her or to stop does not change her consistent testimony throughout, that her uncle assaulted her. Lidell has not demonstrated that anything his lawyer did or did not do in connection with this matter made the result of the trial unreliable.

7. "At trial, S.L. testified that she was wearing a nightshirt but no underpants. In the DVD recorded interview, S.L. stated that Mr. Lidell took her underpants off and later washed them because there was 'dooky' in them." (Record citations omitted.)

¶16 The trial court addressed this point in its order denying the postconviction motion:

> The defense alleges that the victim was inconsistent about whether she wore underwear. She testified on the video that the defendant took her underwear off. She testified at the Preliminary Hearing that she was naked at some point during the assault. At trial, after testifying that her clothes were already off, she then stated that she was wearing no underwear. It is plainly obvious and logical that she did at one time have on underwear and that she also, at another point, did not have on underwear. The questions posed to the child never clearly stated at what point in time the questioner was referring. Therefore the answers are logical in context.

We agree because Lidell here is comparing apples to oranges. The questions that drew the different responses were not the same and were not specific as to time.

Lidell has not demonstrated that anything his lawyer did or did not do in connection with this matter made the result of the trial unreliable.

8. "S.L. testified at the preliminary hearing that she did not see anything come out of 'his thing' but felt a little wet. In the DVD recorded interview, S.L. explained that she saw 'green stuff' come out of his 'thing.'" (Record citations omitted.)

¶17 Again, this inconsistency is not unusual given the child's age. As the trial court found, S.L. did not always "use the same words each time," and she "seemed to search for words to explain something she did not fully understand." Questioning S.L. about her answers on this point would not have made a difference in the outcome of this case because her testimony about the assault remained substantially consistent over a nineteen-month period.

9. "S.L. testified at the preliminary hearing that the incident occurred in winter when she was six years old. In the DVD recorded interview, S.L. stated that she did not remember whether it was hot or cold outside, nor did she remember whether she was in school." (Record citations omitted.)

¶18 This is the part of the DVD interview Lidell cites:

> [**POLICE OFFICER**]: Okay. Do you remember if it was hot or cold outside?
>
> **SL:** I don't know, I was not there.
>
> **[POLICE OFFICER]:** … Okay, do you remember if you were in school?
>
> **SL:** No.

Given S.L.'s age and the literal answers she gave throughout, her "I was not there" answer could mean "I was not outside." And her "No" to the next question very well could mean, "No I was not in school – I was at my grandma's house."

Regardless, not cross-examining S.L. on this alleged inconsistency did not make the result of the trial unreliable.

10. "At trial, S.L. testified that the bus driver was male. In the DVD recorded interview, S.L. stated that the bus driver was a lady." (Record citations omitted.)

¶19 Lidell is correct that when S.L. was asked if the bus driver was a "lady or a man," she said "Lady." When S.L. was asked "was it a female bus driver or a male bus driver?" she answered "A male bus driver." But this testimony does not necessarily make S.L.'s testimony inconsistent. First, given her age, it is possible she knew the difference between a lady and a man, but did not know the difference between a male and a female. Second and more to the point, the Record confirms that S.L.'s bus driver was a woman *and* that she reported to the school what S.L. had told her. Thus, whether S.L.'s testimony about the sex of the driver was or was not inconsistent, any inconsistency was *de minimis* and did not go to the heart of the controversy. Accordingly, Lidell has not demonstrated that not further exploring on cross-examination the sex of the bus driver made the result of the trial unreliable.

11. "S.L. testified at the preliminary hearing that while the incident occurred, her uncle and grandma were upstairs, asleep. In the DVD recorded interview, S.L. explained that her uncle came in after she was assaulted." (Record citations omitted.)

¶20 As the trial court pointed out, both statements can be interpreted consistently: S.L.'s grandmother and uncle were asleep, but then the uncle woke up and walked in after Lidell had finished assaulting S.L. Thus, not asking S.L. about this did not make the result of the trial unreliable.

12. "S.L. testified at trial that she was saying her prayers on the downstairs couch and her grandmother was upstairs. In [the police] report, S.L. reportedly stated that she was sleeping on the living room sofa when her pajamas were pulled off." (Record citations omitted.)

¶21 Here, Lidell is comparing a police officer's summary of what occurred to S.L.'s *testimony*. And, regardless of whether Lidell interrupted her prayers or her sleep, S.L. remained steadfast as to the actual event. Not cross-examining on this matter did not make the result of the trial unreliable.

13. "S.L. testified at trial that the bus driver was male. Police officers …, or the bus driver Jopheenya Reynolds would have established that the bus driver was a female." (Record citations omitted.)

¶22 We have already determined in paragraph nineteen that this matter did not make the result of the trial unreliable.

14. "S.L. testified at trial that she was not wearing underpants. Police Officer Angiolo wrote that S.L. told her that she was wearing a nightgown and underpants." (Record citations omitted.)

¶23 We have already determined in paragraph sixteen that this matter did not make the result of the trial unreliable.

15. "S.L. testified at trial that she was on the downstairs couch when the incident occurred. Police officer Angiolo wrote that S.L. was ready for bed while sitting on a couch, on her knees, in a room in the upstairs." (Record citations omitted.)

¶24 S.L's testimony as to where she was assaulted was consistent. Not cross-examining her on the difference between her testimony and what the officer wrote did not make the result of the trial unreliable.

B. *Calling other witnesses.*

¶25 Lidell also argues his lawyer should have called Lidell's mother and cousin to testify at trial. Both submitted affidavits in support of the motion saying that they were available. In her affidavit, Rosetta Liddell said that S.L. "never slept downstairs," that certain lights "are always on," that she is "always in the home to supervise, feed, bathe, and dress" S.L., and that "Clyde … Miller [Lidell's cousin]… also lived with me during that period. Miller slept on the [downstairs] couch." Miller said in his affidavit that he lived at Rosetta Liddell's home, that he "slept on the downstairs couch" or "in the front room," "was unemployed" "[f]rom 2003 through 2004" but did "occasionally [do] auto repairs to earn money," and he "never traveled nor spent nights anyplace other than [Rosetta Liddell's] home" "[f]rom "2003 through 2004." The trial court found: "The evidence proffered from Rosetta Liddell and/or Clyde Miller would not strengthen the defense case materially and therefore failure to call the witness did not prejudice the Defendant."

¶26 As we have seen, Lidell's lawyer testified at the ***Machner*** hearing that he interviewed both the mother and the cousin, but decided not to call them because he recognized that they were biased and, further, because he believed that their demeanor would not help the defense. He explained: if "they had anything to say that was worth a[n] ounce of salt, I mean, I would have called them, but I just didn't feel that they added much to the case," and "they could not say that it was impossible for the child to be in that location." This was a reasonable strategic decision, and is thus largely immune from second-guessing in the context of an ineffective-assistance-of-counsel context. *See* ***State v. Snider***, 2003 WI App 172, ¶22, 266 Wis. 2d 830, 847, 668 N.W.2d 784, 792.

¶27 Based on the foregoing, Lidell's trial lawyer did not ineffectively represent him.

C. *Interests of Justice*.

¶28 Finally, Lidell asserts that he should be granted a new trial in the interests of justice, because "too many things did not happen at Mr. Lidell's trial for the real controversy to have been 'fully tried.'" *See* WIS. STAT. § 752.35 (court of appeals may grant a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried"). Citing ***State v. Wyss***, 124 Wis. 2d 681, 370 N.W.2d 745 (1985), he argues that the factfinder in this case should have been given the opportunity to hear the testimony of his mother and cousin, and the opportunity to assess the cross-examination on the fifteen alleged inconsistencies. As we have seen, however, Lidell has not shown that any of the matters to which he refers made the result of the trial unreliable. Indeed, the factfinder here was the trial court, and it determined that none of those matters would have changed its verdict. Lidell has not shown that our discretionary reversal under § 752.35 is warranted.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.