COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0648-CR **Cir. Ct. No. 98CF000538**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANCISCO HERNANDEZ-ROSAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Francisco Hernandez-Rosas appeals a judgment convicting him of two counts of first-degree sexual assault of a child and an order denying his motion for a new trial or resentencing. He argues that his trial counsel provided ineffective assistance by introducing or failing to object to six areas of testimony and that he is entitled to a new trial in the interest of justice because the

true controversy was not tried based on those six alleged errors. He also argues that the sentencing court improperly refused to consider all of his positive behavior. We conclude that his counsel was not prejudicially ineffective and there is no basis for granting a new trial in the interest of justice. We also conclude that, although the sentencing court should have considered Hernandez-Rosas's recent behavior, he has not established any prejudice from the court's refusal to consider that information.

¶2 To establish ineffective assistance of counsel, Hernandez-Rosas must show that his counsel's performance was deficient and the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential, and this court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id.*** at 689. Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Id.*** at 690. To establish prejudice, Hernandez-Rosas must show more than a conceivable effect on the outcome. ***Id.*** at 693. He must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines this court's confidence in the outcome. ***Id.*** at 693-94. A new trial based on a jury hearing inadmissible evidence will be granted only if it "so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶3 The complaint charged Hernandez-Rosas with sexually assaulting a nine-year-old girl. In addition to the victim, the State's witnesses included her mother, her friend Alexis, who witnessed Hernandez-Rosas in bed with the victim, Alexis's mother, in whose home Hernandez-Rosas resided for a short time, and

social worker Mary Anich. Hernandez-Rosas challenges aspects of each individual's testimony.

¶4 Hernandez-Rosas first complains that his trial counsel did not object to the victim's mother's hearsay statements regarding what the victim told her. Counsel was not ineffective and this issue provides no basis for granting a new trial in the interest of justice because the statements were not hearsay. The victim's prior consistent statements are admissible under WIS. STAT. § 908.01(4)(a)2[1] to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. This case had been tried once before, and the trial court granted a new trial following Hernandez-Rosas's conviction and sentencing. The prosecutor reasonably believed that the victim's testimony would be challenged as a fabrication. In addition, at the postconviction hearing, defense counsel confirmed that his theory of the case from the onset was that the children were lying and that their mothers improperly influenced their daughters' testimony. Although the victim's mother was the first witness called, the prosecutor reasonably and correctly anticipated the defense and presented evidence that the victim had consistently told the same story. In addition, the testimony was brief and cumulative of the victim's testimony. Therefore, any error by allowing the testimony was harmless. *See* ***State v. Mainiero***, 189 Wis. 2d 80, 103-04, 525 N.W.2d 304 (Ct. App. 1994).

¶5 Hernandez-Rosas's second challenge relates to the victim's mother's statement on cross-examination that she believed her daughter. That statement

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

was made in response to the question whether she asked her daughter why she had not earlier reported the assaults. The mother answered in part, "I knew she was telling me the truth." Hernandez-Rosas's counsel did not elicit that unresponsive statement, and he reasonably chose not to accentuate that testimony by objecting. The jury would have known that the mother believed her daughter because she reported the incident to the police. He reasonably did not ask for a mistrial because that request would not have been granted based solely on a witness verbalizing information that the jury already could extrapolate from other information. The eight words in question uttered during a two-day trial did not so permeate the evidence as to support a claim that the true controversy was not fully tried.

¶6 Hernandez-Rosas's third complaint relates to his counsel's cross-examination of Alexis. He asked Alexis to relate what the victim told her about being sexually assaulted. Hernandez-Rosas argues that this testimony violated the rules set out in ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), and ***State v. Romero***, 147 Wis. 2d 264, 432 N.W.2d 899 (1988). He does not further explain the nature of those alleged violations. We see no applicability of these cases to Alexis's testimony. Alexis's testimony would have been admissible over a hearsay objection as a present sense impression because the victim described or explained to Alexis an event immediately thereafter. *See* WIS. STAT. § 908.03(1). In addition, Hernandez-Rosas has not established that the statement was prejudicial. The evidence was cumulative and the prosecutor did not rely on it in his closing statement.

¶7 Hernandez-Rosas's fourth complaint relates to Julie Bessette's testimony regarding a fight at her residence between Hernandez-Rosas and his wife that resulted in Bessette calling the sheriff and having them removed. On

cross-examination, in response to defense counsel's question whether Hernandez-Rosas moved out of the residence on good terms, Bessette vaguely described an early morning fight in which one of the parties pulled a knife. While this testimony was irrelevant, it was not prejudicial. Bessette did not indicate who was the aggressor in the fight. The jury later learned that Hernandez-Rosas's wife had "quite a record." The evidence was consistent with Hernandez-Rosas being the victim of his wife's crime. The prosecutor never mentioned the incident in his closing argument and the record discloses no basis for believing that Bessette's testimony regarding the fight had any effect on the verdict.

¶8 Hernandez-Rosas's fifth and sixth complaints relate to his counsel's questions to social worker Mary Anich asking her to recite what the victim told her about the sexual assaults and eliciting Anich's statement that "three separate situations" were discussed. Counsel explained at the postconviction hearing that his intent was to uncover inconsistencies in the victim's various accounts of the incidents. Counsel succeeded in establishing confusion as to the number of assaults and used this evidence to support his contention that the inconsistencies showed that both the victim and Alexis were lying. The reference to a third "situation" arguably supports the defense's position that the victim embellished her stories at various times and gave inconsistent statements. These matters were admissible to show prior inconsistent statements under WIS. STAT. § 908.01(4)(a)1 and, although unsuccessful, constituted a reasonable defense strategy.

¶9 Hernandez-Rosas also argues that the cumulative effect of these errors warrants discretionary reversal. We perceive neither individual nor collective error that would warrant discretionary reversal.

¶10 After Hernandez-Rosas's first conviction and sentencing, the trial court vacated the convictions and ordered a new trial. After Hernandez-Rosas was again found guilty of the same crimes, the court imposed the same sentences as it imposed after the first trial, concluding that it was not allowed to consider his positive conduct in prison following the first conviction. The State correctly concedes that the trial court's ruling was erroneous. *See* ***State v. Carter***, 208 Wis. 2d 142, 157, 560 N.W.2d 256 (1997). A sentencing court should consider all information at resentencing including events that occur after the initial sentence. Nonetheless, Hernandez-Rosas has not established any prejudice from the trial court's error. Although the sentencing court refused to consider Hernandez-Rosas's lack of prison disciplinary reports, the court's comments establish that it would not have found that factor persuasive. The court commented that it would expect a prisoner to cooperate with authorities. The sentence was based primarily on the seriousness of the offenses and not on any other aspect of Hernandez-Rosas's character. Likewise, his academic pursuits in prison, studying English and math, do not substantially mitigate the crime or demonstrate good character for a man convicted of two counts of sexually assaulting a nine-year-old. The trial court's comments at the second sentencing establish that the sentence would not have been more lenient if it had considered Hernandez-Rosas's conduct in the prison after the first conviction. Therefore, he has established no prejudice from the court's refusal to consider those factors.

By the Court.—Judgment and order affirmed.

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