COURT OF APPEALS
DECISION
DATED AND RELEASED

June 12, 1996

No. 94-3087-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY R. WEST,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Anthony R. West appeals from judgments convicting him of two counts of first-degree sexual assault of a child as a repeater and from an order denying his motion for postconviction relief. He claims that his trial counsel was ineffective during plea agreement proceedings, at trial and at sentencing. We disagree and affirm the judgments and the order.

West was charged in the information with two counts of first-degree sexual assault of his stepdaughters, who were seven and eight at the

time of the late-December 1990 incident. West allegedly entered the girls' bedroom in the middle of the night wearing a Santa Claus suit and touched their vaginal areas underneath their nightgowns and underwear. West admitted to a sheriff's department detective that while dressed up as Santa Claus approximately three days before Christmas and after heavy drinking, he went upstairs in the middle of the night to speak with the girls about not letting boys touch them in intimate areas. West was bound over for trial after a preliminary examination.[1]

INEFFECTIVENESS DURING PLEA PROCEEDINGS

The following facts are relevant to West's claim that his trial counsel, Charles K. Stowe, rendered ineffective assistance throughout pretrial plea agreement proceedings. West's counsel at the time plea negotiations ensued, Larry D. Steen, wrote to the district attorney on September 8, 1993, to outline the terms of the parties' plea agreement. The agreement provided that the second count of sexual assault and the penalty enhancer as to the first count would be dismissed in exchange for West's no contest plea to one count of first-degree sexual assault. While both parties were to recommend probation, they could argue whether sentence would be withheld or imposed but stayed and the conditions of probation.

At the September 16, 1993, plea hearing, a copy of the September 8 letter was attached to the plea questionnaire West had completed and the trial court accepted West's no contest plea. On October 29, 1993, Steen moved to withdraw West's no contest plea because West had recently decided that while he exercised bad judgment in touching the girls, he had not committed a criminal act and wanted a jury trial. The trial court granted Steen's motion to withdraw as counsel and required successor counsel to file a plea withdrawal motion.

[1] Although the incidents allegedly occurred in December 1990, it was not until the beginning of May 1992 that the girls told a Walworth County Department of Human Services worker that West had touched them. The criminal complaint was filed on November 13, 1992.

Successor counsel, Stowe, filed a motion to withdraw West's plea. On appeal, West argues that Stowe was ineffective throughout the proceedings involving the plea agreement because he failed to withdraw West's plea withdrawal motion and salvage the September 8 plea agreement for him. West also contends that Stowe gave him advice which was contrary to applicable law and precluded him from making an informed decision concerning his plea.

At the November 12 hearing on West's motion to withdraw his plea, Stowe stated the following grounds for plea withdrawal: (1) West did not fully understand the nature of the crime or the evidence against him; (2) West did not fully understand the rights waived by entering a plea; and (3) West, concerned about the probation term and conditions to be recommended by the State, including possible jail time,[2] felt that the State might breach the plea agreement. The district attorney responded that while the parties had agreed to recommend probation, there had been no agreement as to the term or the conditions. Stowe stated that West had received information through previous counsel (Steen) that the State's sentencing recommendation would be other than that contained in the September 8 letter. Later in the hearing, Stowe related to the court that West might consent to the September 8 letter describing the plea bargain "if he had some guarantee that that would be the sentence the court would impose."

Contacted by telephone, Steen testified that he told West that one year in the county jail would be the maximum imprisonment as a condition of probation. Steen never received any indication that the State was going to breach the plea agreement. Steen advised the court that West had consistently maintained that he did not touch the girls for purposes of sexual arousal or to degrade or humiliate them. The court determined that a further hearing was required to take testimony from Steen as to the level of his former client's understanding regarding the nature of the charges.

[2] Because West was scheduled to be released from incarceration on another matter in October 1996, he was very concerned about the possibility of a jail term extending that date.

At the continued hearing on November 19, Steen testified that West appeared to understand the provisions of the plea questionnaire he signed and that he had reviewed the elements of the crime with West.

During this hearing, Stowe informed the court that West no longer claimed that the State would renege on the plea agreement. The trial court then put the question directly to Stowe whether West wanted to withdraw his no contest plea. After being directed to confer with his client, Stowe informed the court that West wanted to know whether if he withdrew his motion the court would sentence him that day. The court stated that it would be willing to sentence that day. However, the district attorney reiterated that West had alleged that he did not understand the nature of the charges and that the trial court would have to find that West understood the elements of the crime and the constitutional rights waived,[3] otherwise the court would have to proceed with the motion to withdraw. Rather than addressing the issue before the court, i.e., whether West would affirm that he understood the elements and his constitutional rights, Stowe again inquired of the court whether the district attorney would be willing to argue sentencing that day. At that point, the district attorney withdrew the plea offer. The court then granted West's motion to withdraw his plea and set the matter for trial. West was convicted by a jury on both counts of first-degree sexual assault.

At the postconviction motion hearing, Stowe testified that in order to get a hearing on West's motion to withdraw his plea, he felt he needed to assert that West did not understand the constitutional rights waived or the nature of the charges. Stowe testified that at no time during the proceedings on the motion to withdraw the plea did West ask him to withdraw the motion. Stowe testified that West was more interested in what the court would do on sentencing than in what the State would recommend pursuant to the plea agreement. West wanted a guarantee as to his sentence and did not want to accept the plea agreement until he had such a guarantee. Stowe testified that had he been able to get the court to indicate that it would comply with the plea

[3] In light of West's initial allegations that he did not understand the elements of the charge or the constitutional rights waived by his plea, the State was rightly concerned that the plea had not been taken as required by ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986) (plea must be knowingly, voluntarily and intelligently entered, and defendant must possess accurate information about the nature of the charge and understand the constitutional rights waived by the plea).

agreement and give a guarantee as to the sentence, he would have placed West's assent to the agreement on the record.

On cross-examination, Stowe testified that West maintained throughout the plea-related motion hearings, trial and sentencing that he was innocent. Stowe acknowledged that when the State finally sought to withdraw from the plea, he did not object in part because West had maintained his innocence and did not want to serve any more jail time. On redirect, Stowe testified that West was willing to withdraw his motion if the State renegotiated the plea agreement consistent with his understanding of that agreement. However, the district attorney declined to renegotiate the plea agreement. Stowe testified that he believed his client heard the district attorney say that if he did not accept the plea agreement, it would be withdrawn.

West testified that he believed the plea agreement required probation with possibly a year in the county jail as a condition. After Steen mentioned something about a possible ten-year concurrent sentence, he told Steen that he wanted to withdraw from the plea agreement. After Stowe replaced Steen, West told Stowe that he wanted to withdraw his plea because he was innocent but did not give any other reasons for withdrawing. Stowe advised West that those grounds were insufficient and told him he had to assert that he did not understand the constitutional rights waived or the nature of the charge. Although West testified that he wanted Stowe to withdraw his motion, he did not testify that he made that desire clear to Stowe. West later testified that he told Stowe he wanted the plea agreement and did not require the court's assurances regarding sentencing.

The trial court found that before Stowe assumed West's case, West wanted to withdraw from the plea agreement on the ground that he was innocent. The court also found that before the State learned that West wanted to withdraw his motion, the State accepted his motion to withdraw. The court found there was no evidence that West made clear to Stowe that he no longer required assurance from the court regarding his sentence and that he was willing to go along with the plea agreement. The court found that West advised Stowe that he wanted guarantees regarding the likely sentence even though West's desire to serve any jail term concurrently with his present sentence was not part of the plea agreement. The court concluded that West breached the

plea agreement. The court found no prejudice to West because he got what he wanted: an opportunity to withdraw his plea.

The trial court also found that there was a mutual mistake regarding the plea agreement: the district attorney offered probation with the right to argue conditions of probation, which could include a term in the county jail; and West believed that the plea required probation and no extra jail time. The court found that even if Stowe misinformed West that he had to make certain allegations in order to withdraw his plea, this was of little consequence because there had never been a meeting of the minds with regard to the plea agreement.

On appeal, West argues that Stowe was ineffective throughout the plea proceedings because he failed to withdraw West's motion and salvage the September 8 agreement. In the alternative, West argues that Stowe provided him with advice which was contrary to applicable law and precluded him from making an informed decision concerning his plea.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 127, 449 N.W.2d at 847-48.

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced the defense. ***Id.*** at 127, 449 N.W.2d at 848. The 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. ***Id.*** at 129, 449 N.W.2d at 848. A reasonable probability is a probability sufficient to undermine confidence in the

outcome. ***Id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. ***Id.***

The decision regarding what plea to enter is the client's, not counsel's. ***State v. Ludwig***, 124 Wis.2d 600, 610-11, 369 N.W.2d 722, 727 (1985). While West argues on appeal that Stowe failed to communicate to the court his ultimate desire to accept the plea agreement, the trial court found that West did not make this desire clear to counsel and that his insistence on the deletion of a possible jail sentence as a condition of probation was outside the terms of the agreement.[4] The trial court's findings of fact are not clearly erroneous. *See* ***Knight***, 168 Wis.2d at 514 n.2, 484 N.W.2d at 541.[5] We see no deficient performance on the part of Stowe with regard to plea proceedings.

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[4] West's interest in obtaining guarantees regarding a possible sentence is of no consequence because the trial court had no obligation to agree with or commit to the sentence recommended in the plea bargain. ***State v. McQuay***, 154 Wis.2d 116, 128, 452 N.W.2d 377, 382 (1990).

[5] West argues that Stowe did not require the State to comply with ***State v. Rivest***, 106 Wis.2d 406, 316 N.W.2d 395 (1982), which governs setting aside a plea agreement at the State's request. The focus of the lengthy pretrial proceedings was West's motion to withdraw from the plea. In effect, the State acceded to West's request to dispose of the plea agreement. Under the facts and circumstances of this case, we do not see that the State and the trial court were required to employ the ***Rivest*** analysis when the State indicated that it no longer wanted the plea agreement. *See* ***id.*** at 412-14, 316 N.W.2d at 398-99 (material and substantial breach of plea agreement must be proved before judge who took the plea).

INEFFECTIVENESS AT TRIAL

West argues that Stowe's performance at trial was deficient and prejudicial because he failed to corroborate West's defense and failed to object to the introduction of irrelevant, prejudicial hearsay and a jury question resulting from the introduction of that hearsay evidence.

Although West admitted touching the girls, he defended on the basis that he did not touch them for any unlawful purpose, but only to instruct them where boys should not touch them. West testified that such instruction was necessary as a result of an incident in which one of his nephews undressed the older girl and laid on top of her in the garage of the West home. According to West, the garage incident occurred ten days to two weeks before the touching incident for which he was on trial.

West contends that Stowe did not present "highly relevant evidence corroborative of [his] defense" in any meaningful fashion. In fact, West alleges that "highly irrelevant and prejudicial evidence contradicting [his] testimony was admitted and specifically considered by the jury." The issue was whether and when the garage incident occurred which allegedly motivated West to counsel his stepdaughters about "good touch-bad touch" at 3:00 a.m. while intoxicated and wearing a Santa Claus suit. West contends that because counsel's representation fell below the standard of reasonableness expected of a prudent attorney, "the jury was ultimately led to believe that, there was, in fact, reason to doubt whether the garage incident ever took place and therefore reason to doubt [West's] testimony."

West's defense focused on negating the element of first-degree sexual assault which requires sexual contact with the victim for the purpose of sexually arousing or gratifying the defendant or sexually degrading or humiliating the victim. *See* §§ 948.02(1) and 948.01(5), STATS. At trial, West's estranged wife and the victims' mother, Deborah, testified that West came home intoxicated after midnight on the evening in question. He wanted to don a Santa Claus suit and surprise the girls. Deborah told him not to wake the girls. Approximately fifteen to twenty minutes later, Deborah was awakened by a crash. She ran upstairs and found West sitting on the bed of the older girl, Titiana, whispering in her ear. West told Deborah that he was talking to

Titiana, and Deborah told him to come back downstairs and let the girls go to sleep.

Titiana testified that West, while wearing a Santa Claus suit, came into the bedroom she shared with her younger sister, Fawn. West asked Fawn what she wanted for Christmas and touched her. West then asked Titiana what she wanted for Christmas and touched her in "the private and mostly around there." Titiana testified that West "kind of rubbed" the skin around her private area. She denied that West said anything about not letting boys touch her there. Fawn testified that West touched her privates while he was wearing a Santa Claus suit, did not mention anything about not letting boys touch her and then went to Titiana's bed.

West admitted entering the girls' bedroom at approximately 3:00 a.m. in a Santa Claus suit. He testified that he asked Fawn what she wanted for Christmas and then asked her about an incident involving his nephews.[6] West admitted touching Fawn above the vaginal area and advising her not to let boys touch her there. He then went to Titiana's bed, asked her what she wanted for Christmas, told her that Fawn said she had been involved in an incident with his nephews, told Titiana not to let boys "touch you there" and then touched her intimately. He then turned around and found Deborah in the room.

West claimed that he was motivated to touch the girls for several reasons. First, he claimed knowledge of the garage incident, which he testified occurred ten days to two weeks before he "instructed" the girls and involved one of his nephews undressing Titiana and laying on top of her in the garage. West claimed to have been present when Deborah talked with Titiana about the incident but felt that he needed to further instruct the girls while dressed as Santa Claus. Second, he believed that he and Deborah were headed to prison for committing theft by fraud and that the girls would be sent to live with their father in Nebraska. However, he testified that he thought the girls might see his nephews more often, too. West "instructed" the girls out of fear that their father might abuse them or as a result of an incident involving a boy in Darien who allegedly molested Titiana. However, West acknowledged a prior statement to

[6] Neither girl mentioned the incident involving West's nephews during her trial testimony.

the police in which he made no reference to these two reasons for instructing the girls.

Rachel Hanson, who was engaged to West's brother, testified that Fawn told her daughter that West, while dressed as Santa, told Fawn where boys should not touch her and then had touched her there.

West claims that Stowe's representation was deficient because the jury had reason to doubt whether the garage incident ever took place and therefore had reason to doubt West's testimony. However, our review of the record indicates that it was West's testimony which could have created doubt in the jury's mind. Furthermore, the jury was entitled to believe the victims' testimony that West never said anything to either of them about not letting boys touch them. On cross-examination, West admitted not telling the police about the garage incident as his motivation to instruct his stepdaughters. West was also cross-examined about inconsistent statements he made while in chambers regarding the garage incident to the effect that the incident occurred two months before he instructed the girls and that Titiana had taken her swimming suit off in the garage in the winter months. West admitted that Deborah spoke to Titiana about the garage incident, but he felt he had to also address the issue with the girls. West did not tell the police about the Darien incident in June 1992 when he was questioned about touching his stepdaughters. West's testimony was sufficient to create doubt in the jurors' minds regarding his credibility and motivation in touching the girls.

West contends that Stowe's representation was deficient because he did not present evidence that West reasonably believed that the garage incident had occurred. West argues that the only corroborating evidence introduced at trial that West had a reasonable basis for believing the garage incident took place was West's testimony that he was present when Deborah spoke to Titiana about the incident the next day. However, West argues that Stowe should have put before the jury a statement Deborah gave to police in 1992 in which she described the incident involving the victims and West's nephews. According to the statement, one of the victims told her mother that her sister had taken her clothes off in the garage in the presence of the nephews. In the police report, Deborah stated that she believed this incident took place in 1987 or 1988. At the postconviction motion hearing, Stowe testified that he did not use this information at trial because the report referred to an event which he

believed was too remote. Therefore, he did not attempt to elicit Deborah's testimony about the garage incident because he feared that in so doing, he would put her estimate of the date the incident occurred before the jury. The trial court concluded that Stowe's failure to establish how West knew about the garage incident was not deficient performance because it was reasonable for counsel to be concerned that Deborah's statement that the incident occurred in 1987 or 1988 would undermine West's credibility.

We previously stated the standards for assessing ineffective assistance of counsel. Here, the trial court's factual finding that Stowe made a strategic decision not to explore the garage incident with Deborah is not clearly erroneous. We see no prejudice to West. There was uncontradicted evidence before the jury that Deborah told West about the garage incident and he claimed to have had knowledge of it.[7] Even West concedes in his appellant's brief that "[a]t no time did there appear to be any dispute during the course of the argument on this issue at trial that some type of incident had in fact occurred involving the alleged victims and the appellant's nephews in a garage sometime prior to the incident leading to the charges against the appellant."

West argues that a question from the jury during deliberations highlights Stowe's failure to provide the jury with additional evidence corroborating the garage incident. The jury inquired during deliberations regarding evidence that Titiana denied in a police report that the nephews took her clothes off in the garage. West points to this as an indication that the jury should have been provided with further evidence corroborating West's version because it was apparently swayed by this reference to Titiana's statement in a police report.

This argument does not present a new basis for evaluating Stowe's performance. We have already upheld Stowe's strategic decision not to put on

[7] We note that West claimed at the postconviction motion hearing that he told his mother and his brother about the garage incident. However, the trial court determined that he presented no proof that they would have corroborated his story. The trial court found West's claim incredible and deemed "pure speculation" any possibility that West's mother or brother would have corroborated West's account. In the absence of such evidence, the trial court correctly concluded that Stowe's failure to present such evidence was not deficient performance.

additional information regarding the garage incident through the testimony of Deborah and the trial court's determination on postconviction motion that the other evidence West claims Stowe should have offered (the testimony of his mother and his brother) was purely speculative.

West next complains that Stowe appeared intoxicated during jury deliberations. Approximately one-half hour after the jury received an ***Allen*** charge in response to its statement that it was deadlocked, court resumed outside the presence of the jury to address evidence that Stowe had been drinking. One of the deputies reported to the court that West told him that he believed Stowe was intoxicated. The court instructed the deputy to investigate further and the deputy reported that a sweet odor was detected about Stowe and that he was slurring his words. The court personally observed Stowe insisting that a person to whom he was speaking was someone else and that as Stowe made his way to counsel table, he seemed unsteady. The court further discerned that counsel was slurring his words. However, the court was not certain that counsel's speech was indicative of intoxication.

The court inquired of Stowe whether he was under the influence of intoxicants. Stowe responded that "I attended the lunch break at Moy's and had a drink at the bar, but I do not believe that I am intoxicated, and I wish to confer with my client." The court then addressed West directly and asked whether he had seen Stowe under the influence. West stated that he did not claim Stowe was drunk; he merely told the deputy that "[Stowe] smelled like he had a few." West did not believe Stowe was under the influence of alcohol. West denied telling the deputy that his attorney was drunk. The deputy then told the court that West told him that "[Stowe's] drunker than hell." West then acknowledged that he might have said such a thing to the court officer. West testified that he first noticed Stowe's condition after the court responded to the jurors' inquiry regarding Titiana's statement in the police report regarding the garage incident.

Stowe admitted to the court that he had approximately three drinks that evening. He stated that he did not believe he was intoxicated, although he volunteered that he would not operate his vehicle and intended to remain in town overnight. The court detected in Stowe's speech a slight hint that he might be under the influence of alcohol but did not have sufficient evidence from which it could conclude that Stowe was under the influence of an

intoxicant at any time important to West's defense. The jury returned a verdict a few hours later.

At the postconviction motion hearing, Stowe was questioned about his consumption of alcohol during deliberations. West argues on appeal that the record supports a finding that Stowe's judgment was impaired due to his consumption of alcohol and that such impairment occurred at a critical stage in the proceedings. While we agree that counsel's consumption of alcohol prior to the entry of a verdict and conclusion of proceedings was unprofessional, we cannot conclude, based on this record, that counsel's condition prejudiced West.

It appears from the record that the only matter which came before the court subsequent to West's discovery that Stowe had consumed alcohol was whether the jury should continue deliberating after 11:00 p.m. or should be given an opportunity to resume deliberations in the morning. West and counsel indicated that it did not matter to them whether the jury continued deliberating or resumed in the morning. When the jury indicated that it desired to continue deliberating, West did not oppose that decision. The court found no evidence that Stowe's representation was impaired by his drinking.

While we normally do not consider the performance prong of the ineffective assistance analysis when no prejudice has been shown, *see* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990), we do so here due to the nature of counsel's conduct while the jury was deliberating. Counsel must be prepared to respond to questions from the jury and other matters which may arise during deliberations. Such matters require counsel's full attention and ability. Imbibing alcohol while a jury deliberates is evidence of extremely poor judgment and may, under certain circumstances, prejudice the client.

There is no objective standard of reasonableness which contemplates that counsel may imbibe alcohol while the jury is deliberating regardless of counsel's subjective assessment of his or her ability to function as counsel guaranteed by the Sixth Amendment while drinking.[8] Under certain

[8] Pursuant to SCR 20:8.3 (Lawyers Coop. 1996), a copy of this opinion is being provided to the Board of Attorneys Professional Responsibility for its information.

circumstances, drinking during deliberations may result in inherent prejudice, similar to that which can result where an attorney is unconscious or asleep during the trial. Such conduct is "equivalent to no counsel at all. The mere physical presence of an attorney does not fulfill the Sixth Amendment entitlement to the assistance of counsel, particularly when the client cannot consult with his or her attorney or receive informed guidance from him or her during the course of the trial." ***Javor v. United States,*** 724 F.2d 831, 834 (9th Cir. 1984) (citation omitted).

Turning to the prejudice prong of ***Strickland,*** we conclude that despite Stowe's use of alcohol during deliberations, West was not prejudiced. The trial court's response to the jury's request to hear a portion of the trial transcript was a discretionary decision and the court stated at the postconviction motion hearing that it would have provided the transcript regardless of any objection made by West at the time. The trial court found that at the time of the jury question, Stowe was not so intoxicated as to have impaired his ability. These facts do not support a conclusion that West was prejudiced.

INEFFECTIVENESS AT SENTENCING

We turn to West's contention that Stowe was ineffective at sentencing. West argues that Stowe's sentence recommendation was not well thought out and that he did not properly prepare for sentencing. As an example, West points to Stowe's initial recommendation that West be sentenced to from ten to six years, which counsel later clarified as a recommendation of six to ten years. Stowe also apparently referred to a presentence investigation report prepared prior to West's conviction in this case.

At the postconviction motion hearing, the court found that Stowe performed deficiently at sentencing when he attempted to recommend a sentence. However, the court noted that it would not have accepted a probation recommendation, nor was it willing to accept Stowe's recommended six to ten years in prison. The court recalled its reasons for imposing a lengthy prison sentence and found no prejudice to West as a consequence of Stowe's deficient performance at sentencing.

We need not address whether Stowe was deficient at sentencing because we agree with the trial court that there was no prejudice flowing from counsel's performance. *See* ***Moats***, 156 Wis.2d at 101, 457 N.W.2d at 311. In sentencing West, the court referred to West's extensive criminal record, his abuse of alcohol and drugs and other undesirable behavior patterns, the nature of the offenses, his age, educational background and employment history, and the need for close rehabilitative control. The court also considered the need to protect the public from West. The court considered the proper factors in sentencing West. *See* ***State v. Paske,*** 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). West has not demonstrated that had his counsel performed otherwise at sentencing, his sentence would have been less than that imposed by the trial court in the exercise of its discretion.

NEW TRIAL

Finally, West asks this court to invoke its discretionary power to reverse a conviction when the real controversy has not been fully tried or justice has miscarried. He argues that the crucial issue of his credibility was not properly presented to the jury, particularly because Stowe failed to present crucial corroborating evidence of the garage incident. We have already addressed this claim. We will not exercise our discretion to grant a new trial based upon arguments which we have already rejected. *See* ***State v. Echols,*** 152 Wis.2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989).

By the Court.—Judgments and order affirmed.

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