

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2012

Diane M. Fremgen
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. 2011AP1402-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2006CF1335

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOREN E. SERO, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Loren Sero, III appeals a judgment convicting him of sexually assaulting his fourteen-year-old girlfriend, Christina C. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of his trial counsel, Raj Kumar Singh. Sero argues that Singh was ineffective for failing to persuade him to accept a plea agreement and,

at trial, for failing to object to irrelevant testimony and for pursuing a jury nullification defense. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Sero, seventeen years old, was charged with second-degree sexual assault of a child under sixteen years of age based on a DNA test that established a 99.99% likelihood that he was the father of a child born to Christina when she was fifteen years old. Before trial, Singh, Sero and the assistant district attorney discussed a plea agreement. Although the record is not entirely clear regarding the offer, it appears that in return for Sero's guilty or no contest plea, the State agreed to either recommend nine months in jail with the defense being free to argue the length of the sentence or join defense counsel's recommendation of six months in jail. Sero rejected the offer in person.

¶3 At trial, Christina testified that she had a romantic relationship with Sero for two years. Christina was supposed to be living with her grandmother, but ran away and lived with a friend. Without objection, Christina testified she and Sero had sexual relations on numerous occasions. She had hoped to marry Sero and have a family with him. She testified she still cared for Sero but no longer planned to marry him. Christina received no child support payments from Sero despite a court order. When Christina found out she was pregnant, she informed Sero and he was "supportive." At the time of trial, the child was living with foster parents and Christina had a good relationship with them.

¶4 Sero did not testify, and the defense called no witnesses. In his closing argument, Singh quoted the prosecutor as saying, "I'm not saying he's a criminal," but Singh then noted that by bringing this criminal charge, she was

saying Sero was a criminal. Singh stated, “We’re here because somebody in the prosecuting attorney’s office made a decision to charge Mr. Sero with a crime.”

¶5 The jury convicted Sero, and the court imposed a sentence of eight years’ initial confinement and twelve years’ extended supervision.

DISCUSSION

¶6 To establish ineffective assistance of counsel, Sero must show both deficient performance and prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). He must show that counsel’s representation fell below an objective standard of reasonableness. *Id.* at 688. This court must indulge a strong presumption that counsel’s conduct falls within the wide range of professional assistance, and Sero must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.* at 689. The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. *Id.* at 691. Counsel’s strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. When the alleged prejudice arises from a defendant’s failure to accept a plea agreement, he must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been accepted and the court would have accepted its terms, and that the conviction or sentence or both under the offer’s terms would have been less severe. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

¶7 Citing *Lafler*, Sero argues that Singh ineffectively represented him during the plea negotiations. In *Lafler*, after the defendant accepted a plea agreement, he later rejected the offer after his attorney convinced him that the prosecution would not be able to establish intent to murder the victim because she

had been shot below the waist. *Id.* at 1383. The parties stipulated that counsel's performance was deficient based on that erroneous advice. *Id.* at 1384. The court concluded that *Lafler* established sufficient prejudice by showing that he would have accepted the prosecutor's offer and the conviction or sentence would have been less severe than the sentence that was imposed. *Id.* at 1385.

¶8 *Lafler* does not support Sero's claim that Singh was ineffective during the plea negotiation stage. Nothing in the record suggests that Singh discouraged Sero from accepting the prosecutor's offer. At the postconviction hearing, Singh testified that he does not "browbeat" his clients, but leaves it to the client to decide whether to accept a plea agreement. Sero knew he had been adjudicated the father of the child based on the DNA test. He does not claim he did not know the elements of the offense and the potential penalties. Sero has not established deficient performance based on Singh's failure to advise Sero to accept the offer.

¶9 Sero established neither deficient performance nor prejudice from Singh's failure to raise relevancy objections to aspects of Christina's testimony. Sero faults Singh for failing to object to testimony that Christina was a runaway who had not completed high school, that the couple had sex on multiple occasions, that Christina had "deep feelings" for Sero and planned to marry him and that Sero had not paid child support. Singh explained at the postconviction hearing that he was hoping for jury nullification by suggesting that sexual relations between a seventeen year old and a fourteen year old should not be criminally prosecuted. Singh explained that he wanted to portray Sero and Christina as a young couple in love that had consensual sexual relations resulting in the birth of a child. He hoped the jury would conclude that the intercourse should not be treated as a criminal matter and Sero should be freed to enable him to support his child.

Because Sero had no legal defense to the charge and refused to accept the plea offer, pursuing a nullification defense constituted a reasonable trial strategy. Singh's decisions fall within the wide range of professional judgment that cannot be second-guessed on appeal. Sero was not prejudiced by Singh's choice of a nullification defense because Sero had no other defense.

¶10 Sero faults Singh's closing argument, describing it as "haphazard" and "without any coherence whatsoever." However, the law does not recognize the right of a jury to disregard the court's instructions and decide a case on the basis of sympathy. It is difficult to make a nullification argument when the court will not allow that argument if it becomes too apparent that counsel is requesting nullification. Singh's criticism about the district attorney for treating this as a criminal matter was reasonably designed to suggest nullification without being too explicit. Because Sero had no valid defense, Singh had little choice but to "muddy the waters" with his disjointed argument.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

