

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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**Appeal No. 2011AP1264-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2008CF1288

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN D. GARDNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS and KATHLEEN B. STILLING, Judges.
Affirmed.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Jonathan D. Gardner appeals from a judgment of conviction for three counts of second-degree sexual assault of a child, and from an

order denying his motion for postconviction relief.¹ Gardner argues that he is entitled to a new trial because: (1) due to the ineffective assistance of trial counsel, his on-the-record waiver of his Fifth Amendment right to testify was unknowing and involuntary; (2) the trial court erroneously admitted the victim's videotaped statement; and (3) the trial court erroneously admitted unduly prejudicial evidence concerning electronic communications between Gardner and the victim. Gardner also argues that he is entitled to a new sentencing hearing because trial counsel's sentencing argument was inconsistent and constituted ineffective assistance of trial counsel. We reject all of Gardner's claims and affirm the judgment and order.

¶2 Based on allegations that in 2008 Gardner had a sexual relationship with a child under the age of sixteen, Gardner was charged with seven counts of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2009-10).² Prior to trial, Gardner challenged the admissibility of file fragments recovered from the victim's computer which, according to the State, represented electronic conversations between the victim and Gardner. Trial counsel argued that the evidence was unreliable and prejudicial because the expert's report did not correlate the conversations with any specific date, and did not connect the file fragments to any electronic device belonging to Gardner. The trial court ruled that the computer evidence was relevant and admissible, and noted that trial counsel could cross-examine the State's expert on these deficiencies at trial.

¹ The Honorable J. Mac Davis entered the judgment of conviction. The Honorable Kathleen B. Stilling heard and decided Gardner's postconviction motion.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. Though Gardner's offenses occurred in 2008, the statutory language in effect at the time is identical.

¶3 At trial, the victim testified that she and Gardner were involved in a sexual relationship and had engaged in sexual intercourse and contact. Over Gardner's objection, the victim's videotaped statement to law enforcement was played for the jury. A computer forensics expert testified that the victim provided officers with the screen names she and Gardner had used to communicate electronically, and that using those screen names, law enforcement retrieved portions of conversations from the victim's computer. The victim testified that the retrieved conversations accurately represented electronic communications she had with Gardner from her computer. The retrieved conversations were sexual in nature and at least one of the messages alleged to be written by Gardner confirmed his knowledge that their relationship was illegal.

¶4 At the close of the State's case, the trial court conducted a colloquy with Gardner concerning his right to testify. Gardner confirmed that he understood the decision whether to testify was his alone, and confirmed it was his "own voluntary decision to not testify at this trial today[.]" The defense did not present any evidence.

¶5 The jury acquitted Gardner of four of the seven counts. At sentencing on the three convictions, the State recommended "a substantial period of confinement and extended supervision." Relying on mitigating factors including Gardner's lack of any prior criminal record, defense counsel recommended a withheld sentence and probation. The trial court imposed an aggregate thirty-year bifurcated sentence, with twenty years of initial confinement and ten years of extended supervision.

¶6 Gardner filed a postconviction motion alleging in pertinent part³ that trial counsel provided ineffective assistance by: (1) failing to inform Gardner of his constitutional right to testify at trial; and (2) failing to provide documentation of Gardner’s mental health issues at sentencing. After a *Machner*⁴ hearing, the postconviction court denied Gardner’s claims.

Gardner is not entitled to a new trial on the ground that his decision not to testify was based on the ineffective assistance of trial counsel.

¶7 It is undisputed that the trial court performed a personal on-the-record colloquy with Gardner to ascertain that Gardner did not wish to testify, and that Gardner understood the decision was his alone. *See State v. Weed*, 2003 WI 85, ¶¶39-40, 43, 263 Wis. 2d 434, 666 N.W.2d 485 (where a criminal defendant waives his fundamental right to testify on his own behalf at trial, the trial court should conduct an on-the-record colloquy “to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel.”) The record demonstrates that counsel discussed the decision with Gardner immediately prior to the colloquy, and that Gardner informed the trial court that he was making the decision knowingly and voluntarily. During the colloquy, Gardner neither hesitated nor asked the court any questions about his right to testify.

³ Gardner’s postconviction motion raised a number of additional claims of ineffective assistance of counsel. We will not address these claims because they are not raised on appeal. *See State v. Johnson*, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) (issues not briefed or argued on appeal are deemed abandoned).

⁴ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

¶8 Gardner argues that despite the colloquy, his decision not to testify was based on the ineffective assistance of trial counsel in that counsel’s advice was inadequate to “provide him with a sufficient understanding to constitute a valid waiver.” Gardner does not claim he was misadvised about the nature of his right to testify, or that his waiver was the result of undue pressure from trial counsel. *Cf. Weed*, 263 Wis. 2d 434, ¶¶36, 45-46 (defendant claimed she did not understand she had the absolute right to testify at trial); *State v. Flynn*, 190 Wis. 2d 31, 49-50, 527 N.W.2d 343 (Ct. App. 1994) (defendant claimed that waiver of his right to testify was based on defense counsel’s threats to withdraw from representation). Rather, Gardner’s complaint is that trial counsel’s approach was too “laissez faire” and did not provide enough information to enable an informed decision. According to Gardner’s *Machner* hearing testimony, trial counsel “never talked to [him] about the types of questions [he] could expect” on the witness stand and never explained to him “what it would be like to sit up there and testify.”

¶9 At the *Machner* hearing, trial counsel testified that throughout the case, the decision whether to testify “didn’t seem like a topic that [Gardner] was interested in discussing.” She said they had discussed it “on occasion, not in great depth” because Gardner seemed to feel “that something miraculous would happen” and the case would never go to trial. Trial counsel testified that Gardner understood “that his version could come in whether he chose to [testify] or not.” Trial counsel indicated that prior to the on-the-record colloquy, she told Gardner she thought they had elicited Gardner’s version that he never had a sexual relationship with the victim through the testimony of the investigating officer, and asked Gardner if he felt he needed or wanted to testify. Counsel testified that:

I didn't discourage him, I didn't encourage him. I told him it was his decision, that I thought that we had our version in, but that if he wanted to testify he should go ahead and do it.

¶10 The postconviction court concluded that trial counsel's advice to Gardner involved "a reasonable trial strategy" and was not deficient.⁵ The postconviction court also relied on the trial court's thorough colloquy with Gardner and concluded:

So trial counsel's statement that she felt that the case was consistently solid without having his testimony was reasonable under the circumstances. Her concern about exposing him to cross examination was also reasonable under the circumstances...

... So I'm going to find that ... there was not deficient performance and that there was a reasonable trial strategy in advising Mr. Gardner not to testify. And in addition, of course, there was the colloquy with the Court in which the Court went over his right to testify and the pros and cons of it in some detail and ascertained that he was making a knowing, intelligent, and voluntary decision.

¶11 A criminal defendant has the constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. A defendant seeking to prove ineffective assistance must show both that counsel's performance was deficient and that this deficiency was prejudicial. *Thiel*, 264 Wis. 2d 571, ¶18. To satisfy the first prong, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness. *Id.*, ¶19. The second prong requires proof of a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.*,

⁵ In determining that the strategy was reasonable, the trial court also noted that aspects of Gardner's proffered testimony concerning the crime might have allowed the State to introduce harmful information or highlight inconsistent or implausible statements.

¶20. This two-part test is used to assess a defendant's contention that his constitutional right to testify was violated by defense counsel. *State v. Flynn*, 190 Wis. 2d 31, 50, 527 N.W.2d 343 (Ct. App. 1995).

¶12 Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. McDowell*, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the circuit court's findings of fact unless they are clearly erroneous. *Id.* The ultimate conclusion as to whether counsel's performance was ineffective is a question of law we review independently. *Id.*

¶13 We are hard pressed to discern how trial counsel's statement of advice followed by the clear discharge of her duty to ensure that Gardner understood the decision whether to testify was his alone falls below an objectively reasonable standard. According to the record, Gardner was an intelligent and articulate person who assisted his attorney throughout the trial by taking notes during the State's case. Gardner personally sat through the direct and cross-examination of each of the State's witnesses and had previously been interrogated by officers. Gardner understood the issues in dispute, and could reasonably anticipate "the types of questions" to expect on the witness stand. During Gardner's colloquy with the trial court, he did not express any reservations or suggest that he was confused or uninformed. On these facts, trial counsel's explanation to Gardner of his right to testify on his own behalf was not deficient.

¶14 Gardner suggests that trial counsel had an additional duty to more fully explain the benefits and disadvantages of testifying, and the strategic implications of that decision. Gardner cites to language in a foreign case, *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (en banc), wherein the

court, while holding that Teague’s waiver was valid, stated that “[d]efense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide.”

¶15 We agree with the State that *Teague* is not binding authority. Regardless, trial counsel’s advice and Gardner’s subsequent waiver are consistent with the principles set forth in *Teague*. In *Teague*, the defendant asserted that trial counsel’s ineffective assistance deprived him of his right to testify because counsel rested the defense case without calling Teague to the stand. *Id.* at 1530. Teague’s trial counsel testified that when she rested without calling Teague, she believed he had assented to her recommendation that he not testify. *Id.* at 1535. The central tenet in *Teague* is that it is ultimately the defendant’s decision whether to testify, and that the defendant must understand that it is his or her decision. *Id.* at 1534 (“[w]here the defendant claims a violation of his right to testify by defense counsel, the essence of the claim is that the action or inaction of the attorney deprived the defendant of the ability to choose whether or not to testify in his own behalf.”) The court found that trial counsel had advised Teague that the decision whether to testify was ultimately his to make, and held that that because Teague was aware it was ultimately his decision and did not protest, counsel had not performed deficiently. *Id.* at 1535. Similarly, in the present case, trial counsel offered her opinion, but made sure Gardner understood it was ultimately his decision. Gardner expressed no doubts or reservations and asked no further questions during his colloquy with the trial court. Gardner had all of the information he needed in order to make an informed decision. Trial counsel did not perform deficiently.

¶16 In denying Gardner’s postconviction motion, the court also concluded that Gardner’s failure to testify was not prejudicial because Gardner’s offer of proof concerning his expected testimony repeated facts already elicited from the investigating officer on cross-examination. While the postconviction court’s reasoning is sound, we need not address the prejudice prong because we have already determined that trial counsel’s performance was not deficient. *See Strickland*, 466 U.S. at 697 (if the defendant fails to prove either prong, we need not address the other).

The trial court properly exercised its discretion when it determined that the State could introduce the victim’s videotaped statement.

¶17 Gardner argues that the trial court erroneously exercised its discretion in determining that the victim’s videotaped statement was admissible under WIS. STAT. § 908.08(3). As relevant to this case, § 908.08(3) permits the court to admit the videotaped statement of a child under sixteen years old⁶ if “the interests of justice warrant its admission under sub. (4).” Subsection (4) then sets out a list of nonexclusive factors that the court “may consider.” Sec. 908.08(4). A trial court’s decision whether to admit evidence is discretionary and will only be set aside if the trial court has failed to apply a relevant statute or consider legally relevant factors, or has acted based upon mistaken facts or an erroneous view of the law. *State v. James*, 2005 WI App 188, ¶ 8, 285 Wis. 2d 783, 703 N.W.2d 727.

⁶ Different criteria apply for the admission if the videotaped statement of a child under twelve years of age.

¶18 We conclude that the trial court's exercise of discretion was a classic process of reasoning which considered facts of record and was "based on logic and founded on proper legal standards." *State v. Delgado*, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). The trial court's lengthy oral ruling demonstrates that it considered appropriate factors and arrived at a reasoned conclusion. The trial court correctly stated that the burden to demonstrate admissibility was on the State, and that the determination involved a "balancing test." The trial court then applied the statutory considerations to the specific facts of the case. The trial court acknowledged factors favoring inadmissibility, such as that the victim was nearly sixteen years old and was apparently mature and bright. However, the trial court found credible the testimony of the victim's father that the ongoing court proceedings were causing her to manifest symptoms of mental disorders, such as self-mutilation and severe depression. The trial court also considered that though the admission of the videotape would not obviate the need for her in-person testimony, it would reduce the length of time she had to spend on the stand. The trial court noted that it was "a relatively close case" but that on balance, the videotape's admission was warranted in the interests of justice. This constitutes a proper exercise of discretion.

The trial court properly exercised its discretion in admitting evidence of electronic communications purported to occur between Gardner and the victim.

¶19 Gardner asserts that the trial court erroneously exercised its discretion in permitting the State to introduce file fragments retrieved from the victim's computer as evidence of electronic communications between the victim and Gardner. Gardner does not challenge the trial court's finding that the evidence was relevant, but argues that its "probative value [was] substantially outweighed by the danger of unfair prejudice" under WIS. STAT. § 904.03. "[T]he standard for

unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by 'improper means.'" *State v. Payano*, 2009 WI 86, ¶89, 320 Wis. 2d 348, 768 N.W.2d 832 (quoted source omitted). It is the opponent's burden to prove unfair prejudice. *Id.*, ¶80 n.18. Whether evidence should be excluded on the basis of its prejudicial potential "goes to the trial court's discretion to weigh the probative value of the evidence against the possibility of unfair prejudice or other factors which might impede the orderly and expeditious disposition of the issues at trial." *State v. Hinz*, 121 Wis. 2d 282, 285, 360 N.W.2d 56 (Ct. App. 1984) (quoted source omitted).

¶20 We review a trial court's decision to admit evidence for an erroneous exercise of discretion. *Sullivan v. Waukesha County*, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998). Regardless of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision. *Payano*, 320 Wis. 2d 348, ¶41.

¶21 We agree with the State that in light of the nature of the charges against Gardner and the fact that he denied any sexual relationship with the victim, the sexual language in the electronic communications was relevant and provided confirmation and corroboration of the victim's testimony. The electronic communications were therefore highly probative.

¶22 The trial court properly exercised its discretion in determining that the evidence was not unfairly prejudicial. Though Gardner contends that the evidence was unreliable because the forensic expert could not testify with certainty about when these exchanges occurred or trace them directly to Gardner, the trial court considered these factors and recognized them as fodder for cross-

examination. The victim testified that the retrieved communications represented conversations she had with Gardner, adding to the probative value and reliability of the evidence. With regard to the expert's inability to tie Gardner to the conversations, trial counsel effectively cross-examined the expert on this point and made sure the jury understood that though the existence of the retrieved communications corroborated the victim's story, it was only the victim's testimony that tied Gardner to the communications.

Gardner is not entitled to a new sentencing hearing based on the ineffective assistance of trial counsel.

¶23 At the postconviction hearing, Gardner argued that trial counsel was ineffective for failing to present documentation of Gardner's alleged mental health issues. The postconviction court denied this claim after finding that Gardner, himself, declined to undergo a mental health evaluation, and after concluding that the sentencing court was more concerned about the severity of the offense than the status of Gardner's mental health.

¶24 On appeal, Gardner changes course and argues that trial counsel was ineffective for mentioning Gardner's possible mental health issues at sentencing because her reference to his possible bipolar disorder was inconsistent with the defense's probation recommendation. Gardner asserts that trial counsel linked his historically unmedicated bipolar disorder to his inability to complete his service in the armed forces and that "[i]t makes no sense to claim that a person who cannot follow rules and who is potentially a danger to himself or others is an appropriate candidate for probation."

¶25 We agree with the State that Gardner has forfeited this claim by raising it for the first time on appeal. *See State v. Holt*, 128 Wis. 2d 110, 125, 382

N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds as recognized by State v. Grunke*, 2007 WI App 198, 305 Wis. 2d 312, 738 N.W.2d 137. Though Gardner attempts to cast his claim as an expansion of his postconviction argument, the two claims are simply inconsistent. Gardner is correct that the *Holt* rule serves to give trial courts a first opportunity to address postconviction claims. In this case, the postconviction court was never presented with and never addressed the claim that trial counsel performed unreasonably by mentioning Gardner's potential mental health concerns. Trial counsel was never offered the chance to explain her strategy with regard to this particular claim.

¶26 However, forfeiture is a waiver of judicial administration and we will address the merits of Gardner's claim. We conclude that trial counsel's reference to Gardner's mental health issues was not deficient performance. Trial counsel tied Gardner's bipolar disorder to the fact that he would soon be receiving medical insurance through his employer. The inference is that onerous supervision rules would help ensure compliance and sufficiently protect the community. This was a reasonable strategy.

¶27 Additionally, counsel's reference to Gardner's mental health was not prejudicial. The trial court's discussion about Gardner's dangerousness focused on his manipulation of the victim in this case, and his indiscriminate sexual relationships as evidenced by the fact that he was also having a relationship with others, including the victim's mother. The trial court's explanation of its sentence focused on the aggravated nature of the offenses with this victim, including the large age difference, the repeated nature of the acts and that they involved intercourse, and the impact of the offenses on the victim. The trial court did not rely on Gardner's mental health in imposing sentence.

By the Court.—Judgment and order affirmed.

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

