COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2431-CR **Cir. Ct. No. 2009CF4131**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTUAN V. LITTLE,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Antuan V. Little appeals a judgment convicting him of one count of first-degree sexual assault of a child under the age of thirteen and one count of exposing a child to harmful material. He also appeals an order denying his motion for postconviction relief. He argues: (1) that his lawyer

ineffectively assisted him because his lawyer should have sought admission of evidence that the child victim, Jasmine B., made what he characterizes as prior untruthful allegations of sexual assault against another man; (2) that he is entitled to a new trial in the interest of justice because the allegedly untruthful allegations were not admitted at trial; and (3) that his lawyer ineffectively represented him by failing to object to the prosecutor's statements in closing argument about Jasmine B.'s recantation of the accusation against him and by failing to elicit additional testimony showing inconsistencies in her accounts of the sexual assault. We reject these arguments. Therefore, we affirm.

¶2 Little first argues that his lawyer ineffectively represented him because his lawyer did not seek admission of evidence that Jasmine B. previously made what he characterizes as untruthful allegations that another man, Michael C., had sexually assaulted her. "'[I]n order to admit evidence of alleged prior untruthful allegations of sexual assault' … the circuit court must first conclude from the proffered evidence that a jury could reasonably find that the complainant made prior untruthful allegations of sexual assault." ***State v. Ringer***, 2010 WI 69, ¶31, 326 Wis. 2d 351, 785 N.W.2d 448 (citation omitted). The fact that the alleged perpetrator consistently denies an allegation is not sufficient to establish that the prior allegation was untruthful. ***Id.***, ¶39. Similarly, the fact that an alleged perpetrator was not prosecuted does not establish that a prior allegation was untruthful because a prosecutor has "'broad discretion in determining whether to charge an accused.'" ***Id.***, ¶40 (citation omitted).

¶3 According to an incident report by the Milwaukee Police, Jasmine B. told the police that she was sexually assaulted by Michael C. Ten years old at the time she reported the offenses, Jasmine B. provided a graphic account of Michael C.'s assaults six years earlier, which occurred when she was only four

years old. Jasmine B. has consistently maintained that Michael C. assaulted her, although she has at times been unwilling to talk about the assaults. Little contends that the fact that Michael C. was not prosecuted undermines Jasmine B.'s allegations, particularly because the prosecutor noted that there were some inconsistencies in her accounts of the assaults. ***Ringer*** squarely rejected this line of argument. *See* ***id.***, ¶40 (non-prosecution of an alleged offense does not establish that a prior allegation was untruthful because a prosecutor has broad discretion in determining whether to charge). Stated differently, "[t]he intrinsic veracity of the complainant's [prior] accusations should not be confused with the State's inability to meet its burden of proof for a criminal conviction." *See* ***People v. Alexander***, 452 N.E.2d 591, 595 (Ill. App. 1 Dist. 1983). The circuit court properly denied Little's postconviction argument that the circuit court should have admitted evidence that Jasmine B. made what he characterizes as prior untruthful allegations of sexual assault against another man on the grounds that no reasonable jury would be able to conclude that the prior allegations were, in fact, false.

¶4 Little next argues that he is entitled to a new trial pursuant to WIS. STAT. § 752.35 (2009-10),[1] which provides that we have the discretionary power to reverse a judgment where the real controversy was not fully tried or it is probable that justice has for any reason miscarried. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). Little's claim is premised on the same argument we rejected above. We see no reason to exercise our discretionary power to grant Little a new trial under § 752.35.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 Little next argues that his trial lawyer ineffectively represented him because his lawyer did not object to the prosecutor's statements during closing argument about the victim's recantation of her accusation against him and did not elicit testimony showing inconsistencies in her accounts of the sexual assault. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer's performance was deficient and that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." ***Id.*** at 688.

¶6 Little contends that his lawyer should have objected during closing argument when the prosecutor said that Jasmine B. had recanted her allegations against him because she knew her mother loved him and relied on him, and she did not want to make her mother sad. "The line between permissible and impermissible [closing] argument is … drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering facts other than the evidence." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

¶7 The prosecutor's comments in the closing argument were proper because they were squarely based on testimony at trial. Jasmine B. testified that she did not tell her mother about the assaults because she did not want her mother to feel bad and she knew how much her mother loved Little. Jasmine B.'s concern for her mother's feelings was corroborated by Police Officer Karla Lehmann, who testified that Jasmine B. begged Lehmann not to tell her mother about the assaults when she first reported them, writing Lehmann a note during their interview that said, "Please, please, please, please, please don't tell my mom!!!" Jasmine B. also drew a sad face with tears streaming from it on the note. Little's lawyer did not

perform deficiently by failing to object to the closing argument because the closing argument was based on the trial testimony, and therefore any objection would have been overruled.

¶8 Little also argues that his lawyer should have elicited testimony at trial from the Sensitive Crimes Division officer that Jasmine B. told her she lied when she said that Little assaulted her and she accused him because she was angry with him. Little contends that this testimony would have shown that Jasmine B.'s accounts of the assault were inconsistent and would have therefore tended to exonerate him.

¶9 At the ***Machner***[2] hearing, Little's lawyer explained that he made a strategic choice not to elicit testimony to this effect for two reasons. First, he did not want another prosecutor or police officer testifying about Jasmine B.'s recantation to the jury because that would open the door to more testimony about why children recant, thus possibly engendering more sympathy for Jasmine B. Second, he decided to pursue a strategy he thought would be more effective than arguing that Jasmine B. falsely accused Little simply because she was mad at him; instead, he argued that Jasmine B.'s rationale for saying the things that she did was that she wanted to live with her dad, which he thought the jury would be more likely to believe. Where, as here, a lawyer makes *informed* and *reasonable* strategic choices about how to proceed at trial, we will not second-guess those decisions. *See* ***Strickland***, 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable." ***Id.*** at 690. We reject the argument that Little received

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

ineffective assistance from his lawyer because his lawyer had sound strategic reasons for not eliciting information about the recantation at trial.

By the Court.—Judgment and order affirmed.

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