COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1165-CR **Cir. Ct. No. 2008CF852**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNY F. ANTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MARK D. GUNDRUM and KATHRYN W. FOSTER, Judges. *Affirmed and cause remanded with directions.*

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

¶1 BRENNAN, J. Danny F. Anton appeals from a judgment entered following a jury's verdicts, convicting him of one count of first-degree sexual assault of a child and three counts of second-degree sexual assault of a child, and

from an order denying his postconviction motion.[1] On appeal, Anton argues that: (1) his right to the effective assistance of counsel was violated; and (2) the trial court erroneously exercised its sentencing discretion. For the reasons which follow, we affirm.

BACKGROUND

¶2 In October 2008, the State filed an amended information charging Anton with one count of first-degree sexual assault of a child and three counts of second-degree sexual assault of a child. All of the assaults occurred over a six-year period from 1997 to 2003, when the victim was between the ages of ten and fifteen. Anton pled not guilty and the case proceeded to trial.

¶3 At trial, the victim, who was twenty-three, testified. She stated that she first met Anton, her mother's boyfriend at the time, when she was in the third grade. A few months later, Anton moved in with the victim and her mother. The victim testified that the first assault occurred when she "was around [the] fourth grade" and consisted of Anton rubbing her vagina over her clothing until she told him to stop. She testified that the incidents escalated, and that, as time went on, Anton began to manipulate the victim's genitals under her clothes and attempted penis-to-vagina intercourse with the victim. The victim testified that the abuse stopped after the victim's mother and Anton eventually broke up and he moved out, although Anton did attempt to make contact with the victim.

[1] The Honorable Mark D. Gundrum presided over the trial and entered the judgment of conviction. The Honorable Kathryn W. Foster entered the order denying Anton's postconviction motion.

¶4 The victim testified that she did not tell her mother about the abuse because she did not want her mother to think that Anton was cheating on her with the victim or that the victim was betraying her mother. However, in the summer of 2007, the victim was home from college and while in the midst of an argument with her mother she blurted out, "Do you know that [Anton] sexually assaulted me for so long[?]" The victim finally reported the abuse to the police and gave them a statement in January 2008.

¶5 Following the trial, at which Anton did not testify, the jury found the victim credible and found Anton guilty on all four counts charged in the amended information. The court sentenced Anton to a total of forty years of imprisonment and eight years of extended supervision.

¶6 Anton filed a motion for postconviction relief, asserting the issues he now raises on appeal. The trial court held a hearing on the motion, and then denied it. Anton appeals.

DISCUSSION

I. Anton's trial counsel was not ineffective.

¶7 Anton argues that his trial counsel was ineffective for: (1) failing to object during trial to admission of a telephone call between Anton and a detective; (2) failing to call two witnesses; (3) failing to object during trial to the admission of the victim's full statement; and (4) advising Anton not to testify. We address each in turn.

¶8 The right to the effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable here by the Fourteenth Amendment, and article 1, section 7 of the Wisconsin Constitution.

See ***State v. Sanchez***, 201 Wis. 2d 219, 225-26, 548 N.W.2d 69 (1996). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We strongly presume counsel has rendered adequate assistance. ***Id.*** at 690.

¶9 We review an ineffective assistance claim as a mixed question of law and fact. ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. "We will not reverse the trial court's factual findings unless they are clearly erroneous," but we review the effectiveness and prejudice questions independently of the trial court. ***Id.***

A. Anton has not shown that his trial counsel rendered ineffective assistance for failing to object during trial to testimony regarding two telephone calls between Anton and a detective.

¶10 Anton first argues that his trial counsel was ineffective for failing to object to testimony elicited from City of Waukesha Police Detective Debra Preuss regarding two short telephone conversations she had with Anton during her investigation. Anton argues that there was no foundation for the testimony because Detective Preuss did not testify that she had ever met Anton such that she would recognize his voice. However, not only does Anton misrepresent Detective

Preuss's testimony, he fails to show that his counsel's failure to object was prejudicial. As such, we affirm.

¶11 To begin, while Anton attempts to generally argue that his trial counsel should have objected to all of Detective Preuss's testimony regarding the telephone calls, he only raises specific objections to two statements made by Detective Preuss: (1) that Anton initially told Detective Preuss that he did not know the victim; and (2) that Anton told Detective Preuss he had been drinking a lot during the time period in question. With respect to the second statement, our review of the record reveals that Anton misrepresents Detective Preuss's testimony. Detective Preuss's testimony was that Anton told her that the victim's mother was drinking a lot during the period in question, not that Anton was drinking a lot. Detective Preuss testified as follows:

> Q Did [Anton] talk about whether or not he had dated or lived with [the victim's mother]?
>
> A Yes. He did say he had dated [the victim's mother].
>
> Q Did he indicate how long?
>
> A I believe he said about five, five-and-a-half years.
>
> Q Did he make any statements about whether [the victim's mother] was present in the home or not?
>
> A I believe something that she had been home a lot, was flopping around, or being home and drinking during certain times of their relationship.
>
> Q So, he indicated she was flopping around and drinking?
>
> A I believe it was flopping on the couch or flopping at home, something similar to that. I couldn't recall the exact words.

¶12 In short, the record belies Anton's assertion that Detective Preuss testified that he told her he was drinking a lot. As such, we look only to whether Anton has shown that his trial counsel was ineffective for failing to object to Detective Preuss's testimony that during a telephone conversation with Anton he initially denied knowing the victim.

¶13 Even if we accept for the sake of argument that Anton's counsel was deficient in failing to object to Detective Preuss's testimony concerning her telephone call with Anton, he has not shown that the evidence was prejudicial. *See* ***Strickland***, 466 U.S. at 697 (If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails.). The testimony to which Anton objects is as follows:

> Q All right. Now, when you had this first telephone call with Mr. Anton, did you ask him if he knew [the victim]?
>
> A Yes. I asked him if he knew [the victim].
>
> Q And his response to that?
>
> A At first, I believe I asked him if he knew [the victim]. He said he didn't know. I said, "[victim's name]." When I told him that it was the daughter of [the victim's mother], then he remembered.

We fail to see how this testimony is prejudicial. While Detective Preuss testified that Anton initially did not remember the victim, upon being given some additional identifying information, he immediately admitted to knowing her. This testimony hardly demonstrates that the results of the trial are unreliable. *See* ***id.*** at 687. As such, we affirm.

B. Trial counsel did not render ineffective assistance for failing to call two witnesses.

¶14 Next, Anton argues that his trial counsel rendered ineffective assistance for failing to call two witnesses to the stand: Samantha H. and Julie W. We disagree.

Samantha H.

¶15 Anton testified at the postconviction hearing that Samantha H., a friend of the victim's, told him that the victim asked her to lie to police and say that Anton sexually assaulted her, too. Anton contends that he told his trial counsel about his conversation with Samantha H. and that his counsel was ineffective for not calling her to testify to impeach the victim's testimony.

¶16 Trial counsel testified at the postconviction hearing that she was aware that there were rumors circulating that the victim had asked Samantha H. to lie. An outside party had approached counsel and told her that Samantha H. had told her that the victim asked Samantha H. to tell the police that Anton provided them with alcohol in return for sexual services from the victim, but that Samantha H. refused to go to the police because she did not know how the victim obtained the alcohol.

¶17 Trial counsel sent an investigator to interview Samantha H. before trial, but Samantha H. refused to speak to either the defense investigator or the police to verify or deny the rumors. Samantha H. told the investigator that she did not want to testify and that she wanted nothing to do with the case.

¶18 Under these circumstances, no one knew what Samantha H. would testify to if she was called to the stand. In fact, if she testified consistent with

what the outside party had told defense counsel, Samantha H. would have corroborated the victim's testimony that Anton gave them alcohol, leaving open the possibility that it was payment for sex with the victim. If she denied the sexual activity and the alcohol, her testimony would add nothing to Anton's defense. Deciding not to call Samantha H. under these uncertain circumstances was a reasonable and logical strategic tactic that we cannot overturn on appeal. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

Julie W.

¶19 As for Julie W., an alleged friend of the victim's family, Anton contends that she would have testified that the victim and her mother had a terrible relationship and would tell the jury that, while the victim vented to Julie W. about her mother, the victim never said anything negative about Anton.[2] However, our review of the record shows that Julie W.'s testimony would merely corroborate the victim's testimony and that therefore Anton has not shown that his trial counsel was deficient for failing to call Julie W. or that omission of her testimony was prejudicial.

¶20 The victim testified at trial that around the time she told her mother about the sexual assault, but before she went to the police, she began counseling, and that one of the issues she was addressing in counseling was her anger towards

[2] Anton also states in his brief that Julie W. had heard from a third party that the victim asked Samantha H. to lie to the police. However, Anton admits that this testimony would be hearsay, and he does not argue that the testimony would fall within an exception to the general rule banning hearsay. *See* WIS. STAT. § 908.02 ("Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.").

her mother. Both the victim and her mother testified that the victim finally told her mother about the sexual assaults while they were having an argument.

¶21 The victim also testified that she did not tell anyone about the sexual assaults previously because she did not want anyone judging her. She testified that she did not even tell her mother about the sexual assaults because she was worried that her mother would think she was responsible for Anton cheating on her mother and would make her move out.

¶22 Because the jury was already aware of the acrimony between the victim and her mother, and was aware that the victim did not tell anyone about the sexual assaults until years after they had ceased, we fail to see how Julie W.'s testimony would aid the jury. As such, we conclude that Anton's trial counsel was not deficient for failing to call Julie W. as a witness and, even if she was, Anton has not demonstrated that he was prejudiced by the absence of her evidence. *See* ***Strickland***, 466 U.S. at 687.

C. Trial counsel did not render ineffective assistance for failing to object during trial to admission of the victim's full statement.

¶23 Anton also complains that his trial counsel rendered ineffective assistance when she failed to object to the admission of the victim's full statement to police at trial. However, this argument is completely undeveloped. While Anton conclusorily states that admission of the statement under the rule of completeness was "just plain nonsense," he fails to explain why that is so. We will not make Anton's arguments for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). Without explaining why the rule of completeness should preclude the statement we cannot conclude that counsel was deficient for failing to object to its admission. *See* ***Strickland***, 466 U.S. at 690.

¶24 Furthermore, Anton has made no effort to explain why admission of the statement prejudiced him. While he states that it was "extraordinarily unfair" for the jury to have heard the victim's complete story twice, he has not told us how admission of the statement renders the result of the trial unreliable. *See* ***id.*** at 687. In fact, he seems to admit that the victim's written statement to police was consistent with her testimony. As such, we also reject his claim because he has not shown he was prejudiced by his attorney's failure to object to the statement. *See* ***id.*** at 687.

D. Trial counsel did not render ineffective assistance for not persuading Anton to testify.

¶25 Anton argues that his trial counsel rendered ineffective assistance when she failed to persuade him to testify. While he admits that he told the trial court that he did not want to testify, he faults his trial counsel for advising him not to.[3] He now argues that "not testifying was the worst decision that [he] could have made."

¶26 At the postconviction hearing, Anton's trial counsel testified that she advised Anton that, although he could testify if he wanted to, there was no need for him to testify because there were significant problems with the State's case: the victim did not report the sexual assaults until years after they happened, the victim revealed for the first time that she had been sexually assaulted during an argument with her mother, and there was no evidence of any kind to corroborate the victim's story. The trial record supports that conclusion. Trial counsel

[3] As such, Anton does not argue that his decision not to testify was not made knowingly, intelligently, and voluntarily. *See* ***State v. Weed***, 2003 WI 85, ¶¶39-40, 263 Wis. 2d 434, 666 N.W.2d 485.

"presented well-reasoned testimony in support of [her] strategy, and it is not this court's prerogative to second-guess counsel's reasonable tactical decisions." *See* ***State v. Oswald***, 232 Wis. 2d 62, 98, 606 N.W.2d 207 (Ct. App. 1999). Because Anton has not demonstrated that his counsel's performance was deficient, we need not examine whether it was prejudicial. *See* ***Strickland***, 466 U.S. at 697; *see also* ***State v. Harris***, 2012 WI App 79, ¶23, 343 Wis. 2d 479, 819 N.W.2d 350 ("We are mindful that in an ineffective assistance of counsel claim, counsel is 'strongly presumed to have rendered' adequate assistance within the bounds of reasonable professional judgment and that we must be vigilant against the skewed perspective that may result from hindsight.") (citation omitted).[4]

¶27 In sum, counsel was not ineffective and we affirm.

II. The trial court properly exercised its discretion at sentencing.

¶28 Finally, Anton argues that the trial court erroneously exercised its discretion at sentencing because the sentence imposed by the court was "substantially lengthier" than it needed to be. Again, his argument is undeveloped and completely without merit.

¶29 Sentencing is committed to the trial court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis

[4] In so holding, we reject Anton's argument that ***State v. Flynn***, 190 Wis. 2d 31, 527 N.W.2d 343 (Ct. App. 1994), should guide our decision. First, in ***Flynn***, counsel did not just advise the defendant not to testify. Counsel threatened to withdraw from the case if the defendant testified. ***Id.*** at 49-50. Second, we ultimately upheld the judgment in ***Flynn*** because we determined the defendant was not prejudiced by his attorney's performance. ***Id.*** at 52-57. We need not turn to prejudice here because Anton has not shown that his trial counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 697.

in the record for the sentence at issue. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the trial court acted reasonably, and we do not interfere with a sentence if discretion was properly exercised. *See* ***id.*** at 418-19.

¶30 In its exercise of discretion, the trial court is to identify the objectives of its sentence, which include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. ***Gallion***, 270 Wis. 2d 535, ¶40. In determining the sentencing objectives, we expect the trial court to consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the trial court's discretion. ***Id.*** The amount of necessary explanation of a sentence varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39.

¶31 Here, Anton admits in his brief-in-chief that during sentencing the trial court properly examined Anton's background and character, noted that it was concerned primarily about deterrence, and commented with concern that Anton appeared to have no remorse for his actions and continued to deny the allegations. Despite that, Anton conclusorily contends that "the trial court did not impose a sentence appropriately under the facts of his case" because the sentence imposed by the court was "substantially lengthier than it need[ed] to be under ***Gallion***." (Formatting altered.)

¶32 Anton was convicted of one count of first-degree sexual assault pursuant to WIS. STAT. § 948.02(1) (1997-98) (Class B felony), one count of second-degree sexual assault pursuant to WIS. STAT. § 948.02(2) (1997-98)

(Class BC felony),[5] and two counts of second-degree sexual assault pursuant to WIS. STAT. § 948.02(2) (2001-02) (Class C felonies). He faced a maximum possible sentence of 140 years. *See* WIS. STAT. §§ 939.50(3)(b), (bc) (1997-98) & 939.50(3)(c) (2001-02). The sentence totaling forty years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). As such, the trial court properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

[5] The judgment of conviction incorrectly lists count two to be a class C felony, when in fact it is a class BC felony. We direct that a correction to the judgment be made upon remittitur: the circuit court may make the correction itself, or it may direct the circuit court clerk to make the corrections. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857. We note that the misidentified felony classification in the judgment is clearly a scrivener's error and did not lead Anton or the trial court to misunderstand the penalties Anton faced: Anton expressly noted during his statement to the sentencing court that he thought it was unfair that he was facing "prison for 140 years."