COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2276 **Cir. Ct. No. 2006CF442**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTY J. FRANZKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Marty Franzke appeals an order denying his pro se WIS. STAT. § 974.06 (2011-12),[1] motion for a new trial. Franzke had a previous

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

postconviction motion and appeal, and attempts to avoid the prohibition against successive postconviction motions by alleging ineffective assistance of his initial postconviction counsel, Edward J. Hunt. He contends Hunt was ineffective for failing to make two arguments: (1) the trial court violated Franzke's Sixth and Fourteenth Amendment rights when it sent exhibits (human services reports) to the jury room at the jury's request without Franzke or his attorney being present; and (2) Franzke's trial counsel, Joseph Norby, was ineffective for failing to request a mistrial after he learned the jury received these exhibits and because Norby referred to the exhibits as part of an intervention by the agency. He also contends the court improperly exercised its discretion by not allowing him to subpoena Norby, the author of one of the human services reports, and a juror for the present postconviction motion hearing. We reject these arguments and affirm the order.

BACKGROUND

¶2 In 2006, Franzke was charged with two counts of sexual assault and one count of attempted sexual assault of his daughter. The jury acquitted him of the sexual assaults, but convicted him of the attempted sexual assault, which occurred in 2000 when the victim was nine years old. At the time of the 2000 incident, the victim reported to her grandmother that Franzke had choked her. She did not mention any sexual component to the attack. The matter was reported to the human services department and three reports were prepared. None of the reports mentioned any sexual component to the incident.

¶3 At the final pretrial conference, Norby said he was planning to use the reports as part of the defense. In his opening statements, Norby told the jury the victim's allegations were not consistent with the documented incident reports or what she told her grandmother at the time the incident occurred. The reports

were admitted into evidence and the jury was informed that there was no mention of inappropriate sexual contact in the reports.

¶4 Upon completion of the trial, the court asked the attorneys for their position on requests for exhibits by the jury. Norby responded that he wanted to address it on a request-by-request basis. The court agreed and instructed the attorneys to be available within five to ten minutes should they need to be contacted. Twenty-five minutes later, the jury asked for the human services reports. Norby was notified by telephone that his presence was required, but he failed to appear. In his last telephone conversation, he indicated he would arrive in two or three minutes, but seven or eight minutes later he had not appeared. The court sent the human services reports to the jury. A short time later, Norby appeared and the court asked for Norby's comments on sending the exhibits to the jury. Norby stated, "I agree with providing the jury with a copy of the social services report."

DISCUSSION

¶5 Franzke's argument that the circuit court denied his Sixth and Fourteenth Amendment rights by sending exhibits to the jury room without him or his counsel being present fails for two reasons. First, the issue is not properly preserved because, when given the opportunity to raise the issue, Norby did not object to the procedure and stated his agreement with the court's decision to allow the jury to view the documents. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Second, any error was harmless beyond a reasonable doubt. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. Norby's and Franzke's absence from the courtroom when the court

decided to grant the jury's request to see the exhibits did not prejudice Franzke. The exhibits were a vital part of Franzke's defense.

¶6 Franzke's claims of ineffective assistance of trial counsel also fail for two reasons. He has established neither deficient performance nor prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, he must show that counsel's decisions could not be considered sound trial strategy. ***Id.*** at 689. Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Id.*** at 690. To establish prejudice, Franzke must show a reasonable likelihood that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.***

¶7 Norby's failure to make an issue of his and Franzke's absence from the courtroom when the court decided to grant the jury's request to see the human services reports did not prejudice the defense because, had they been present, no objection would have been made. Franzke contends they could have requested that part of one of the reports be excised. That report referred to Franzke's suicide attempt. He contends the report made it appear that the suicide attempt occurred after his daughter made the allegations about choking her in 2000, suggesting consciousness of guilt. He contends the suicide attempt was actually several months before the 2000 incident. However, Franzke does not deny the choking incident. Therefore, even if the jury believed the suicide attempt occurred after the allegations in 2000, that would not necessarily show consciousness of guilt of a sexual assault. It could show consciousness of guilt for choking his daughter. Furthermore, it could reduce the prejudicial effect of the choking incident because it would show his remorse for choking his daughter.

¶8 Franzke contends Norby was ineffective for referring to the human services reports as being part of an "intervention" by the agency. Franzke was not prejudiced by that mischaracterization. "Intervention" suggests a more thorough investigation than the agency provided. The absence of any mention of a sexual component to the attack following a thorough investigation would be more exculpatory than the absence of an accusation of sexual assault in a cursory report. Norby's suggestion that the 2000 incident was contemporaneously reported with no sexual component despite thorough investigations by the human services agency constituted a reasonable strategy that cannot be second-guessed on appeal.

¶9 Finally, the court properly refused to allow Franzke to subpoena Norby, a social worker, and a juror for the postconviction motion hearing. Norby's strategy regarding use of the human services reports was provided by Franzke's initial postconviction counsel, Hunt. The case worker's testimony would not be relevant to any issue raised in the postconviction motion. The juror's testimony would have been precluded by WIS. STAT. § 906.06(2) because a juror may not testify regarding the mental process used in reaching a verdict.

By the Court.—Order affirmed.

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