COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2014

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. 2013AP363-CR **Cir. Ct. No. 2010CF5842**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DELMAR LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Delmar Lee appeals a judgment convicting him after a jury trial of second-degree sexual assault. He also appeals an order denying his postconviction motion without a hearing. Lee argues that his trial lawyer

provided him with constitutionally ineffective assistance by failing to adequately impeach the victim's testimony. We affirm.

¶2 The victim, D.B., testified at trial that she was at her home the evening of the assault with her six children, ages 2 through 11, and her friend Mary Render. D.B. testified that she and Render drank heavily throughout the evening, both beer and tequila, beginning at 5:00 or 6:00 p.m. After the children went to bed, Render's boyfriend, the defendant Delmar Lee, came over to join them. The three adults continued drinking and talking until they decided to go to bed at 1:00 or 2:00 a.m.

¶3 D.B. testified that Render and Lee were staying the night, so she let them take her bedroom. Lee had fallen asleep in the living room next to blankets on the floor on which her two youngest children were sleeping. D.B. woke him up and told him to go into the bedroom to join Render. D.B. testified that she then lay down next to her two children. Before she fell asleep, Lee came back into the living room and asked if he could perform oral sex on her. She told him "to get the hell out of here" and he left. She then fell asleep.

¶4 D.B. testified that she woke up to the sound of crying from her youngest child, who was sleeping next to her. D.B. realized that Lee was on top of her and was having intercourse with her. She told him to stop and went into her bedroom where Render was sleeping. She told Render to take Lee out of the house immediately. D.B. testified that her Aunt Paula, who lived with her and the children, called D.B.'s mother because D.B. was shaking too much to dial the phone. D.B. talked to her mother and other family members and told them what happened. One of them called the police, who came to the house after Render and Lee had gone. D.B. testified that she did not talk to the officers who came to her

house because she thought they were rude to her. She then went to the hospital, where she told police who came to the hospital the details of the assault.

¶5 Render also testified at trial. She testified that she and D.B. spent the evening drinking heavily and that she was asleep in D.B.'s bed when the sound of the youngest child crying woke her. She noticed that Lee was not in bed with her. D.B. then came into the bedroom crying and shaking, and said Lee "was trying to get some." Render testified that Lee was behaving strangely and would not answer her when she asked him what happened. She said that she and Lee then left the house.

¶6 Lee contends that his trial lawyer should have cross-examined D.B. more thoroughly to undermine her credibility and cast doubt on her ability to remember what happened due to her intoxicated state. He contends that her credibility was particularly important because she was the only person who testified about what happened during the assault itself.

¶7 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A lawyer performs deficiently when he or she makes "errors so serious that counsel [is] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To show prejudice, a defendant must show that there is a "reasonable probability" that, but for counsel's errors, "the result of the proceeding would have been different." ***Id.*** at 694. Stated differently, "'[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the [jury] would have had a reasonable doubt respecting guilt.'" ***State v. Domke***, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805

N.W.2d 364 (citation omitted). A reviewing court need not address both components of this test if it concludes that the defendant has made an insufficient showing as to one of the components. ***Strickland***, 466 U.S. at 697.

¶8 A person is guilty of second-degree assault of an unconscious victim if the State proves that: (1) the defendant had sexual contact or sexual intercourse with the victim; (2) the victim was unconscious at the time of the sexual contact or sexual intercourse; and (3) the defendant knew that the victim was unconscious at the time of the sexual contact or sexual intercourse. WIS JI—CRIMINAL 1213. A person is "unconscious" if he or she is suffering from "a loss of awareness." ***State v. Curtis***, 144 Wis. 2d 691, 695-96, 424 N.W.2d 719 (Ct. App. 1988). A loss of awareness may be caused by a variety of things, including taking drugs, drinking alcohol to excess, a medical coma or heavy sleep. *See* ***id.*** at 696 n.1. Whether the victim was unconscious is a question of fact for the jury to decide. ***Id.*** at 696.[1]

¶9 Lee first contends that his trial lawyer should have cross-examined D.B. about inconsistencies in the times that she said things occurred. D.B. testified at trial that Lee came over to her house at 10:30 or 11:00 p.m. At the preliminary hearing, D.B. testified that Lee came over around 9:00 p.m. D.B. testified at trial that they stopped drinking at 1:00 or 2:00 a.m. D.B. told the Sexual Assault Nurse Examiner, Eve Meyer, and Police Officer Deborah Krantz that she went to sleep at 12:00 a.m. We reject this argument. The differences in D.B.'s testimony about the times at which things happened are minimal and unimportant in light of the undisputed testimony that D.B. had consumed a very

[1] Consent is not an issue in cases alleging sexual assault of an unconscious person because a person who is unconscious is presumed incapable of consent. *See* WIS. STAT. § 940.225(4) (2011-12).

large amount of alcohol, which would likely have some effect on her ability to remember the exact times at which things occurred. Because there is no reasonable probability that the result of the proceeding would have been different had Lee's trial lawyer cross-examined D.B. on these points, Lee was not prejudiced.

¶10 Lee next contends that his trial lawyer should have impeached D.B. with inconsistent testimony about how much she drank. At trial, D.B. testified that she drank twelve beers and nine shots of tequila. D.B. told Officer Krantz that she had "more than six beers and at least three shots of tequila." Although D.B.'s statements about the exact amounts of alcohol varied, her testimony overall was to the same effect both at trial and when she talked with the police—that she was intoxicated. She told the police that she "was drunk" and testified at trial that she had "a lot" to drink. There is no reasonable probability that, had Lee's trial lawyer cross-examined D.B. about these discrepancies in the number of drinks D.B. consumed, the result of the proceeding would have been different. Lee cannot show that he was prejudiced.

¶11 Lee next contends that Lee's trial lawyer should have impeached D.B.'s trial testimony that her boyfriend drove her to the hospital. Lee points to Officer Krantz's police report where it says that D.B.'s sister drove her to the hospital.

¶12 The police report is internally inconsistent. The report first states that D.B. told Police Officer Heather Schweitzer, who arrived at the hospital before Officer Krantz, that her boyfriend drove her to the hospital. Later, the report states that D.B. said her sister drove her to the hospital. It is unclear why the police report contains contradictory information, although one possibility is

that both D.B.'s boyfriend and her sister drove her to the hospital together. Regardless, who drove D.B. to the hospital has nothing to do with whether D.B. was conscious when she was assaulted. Lee was not prejudiced by the fact that his trial lawyer did not cross-examine D.B. on this point because there is no reasonable probability that had he done so, the result of the proceeding would have been different.

¶13 Lee contends that his trial lawyer should have impeached D.B.'s trial testimony that Lee asked her if he could perform oral sex on her. Lee contends that his lawyer should have questioned D.B. about why she did not say anything about this to Officer Schweitzer or the nurse. D.B. *did* tell the police, albeit a different police officer, that Lee asked to perform oral sex on her. Officer Krantz included this information in her police report. Once again, we conclude that Lee cannot show that he was prejudiced. There is no reasonable probability that the result of the proceeding would have been different if Lee's trial lawyer had asked D.B. why she relayed this information to only one of the police officers.

¶14 Lee next challenges as insufficient his trial lawyer's cross-examination of D.B. with regard to where Lee initially fell asleep. D.B. testified at trial that Lee fell asleep on the living room floor and she woke him and told him to go join Render in the bedroom. On cross-examination, Lee's trial lawyer asked D.B. why she did not mention this information before trial. D.B. testified that she did, in fact, tell the police about this. Lee contends his lawyer should have introduced the police report to show that the police did not include this information in the report, thus impeaching D.B.'s testimony. Lee's lawyer's questioning implied that D.B. had not mentioned this fact to police. Even if Lee's lawyer had introduced the police report and the jury therefore concluded that D.B. failed to tell the police this information—as opposed to the police simply omitting

it from the report—this was a minor detail that did not bear on the central issue in the case, whether D.B. was conscious during the assault. Again, we conclude that there is no reasonable probability that the result of the proceeding would have been different had Lee's lawyer introduced the police report on this point.

¶15 Finally, Lee contends that Lee's trial lawyer should have impeached D.B.'s trial testimony about the reasons she refused to speak to the first responding officers. At trial, D.B. testified that she did not talk to them because they were rude to her. According to the police report, D.B. told Officer Krantz that she did not talk to them because her "brain was not functioning." Once again, we conclude that Lee has not shown that he was prejudiced. D.B.'s varying testimony on this point was simply not important in the context of the elements the State had to prove to convict Lee. There is no reasonable probability that the result of the proceeding would have been different if Lee's lawyer had raised these points. *See* ***Strickland***, 466 U.S. at 694.

¶16 In sum, we agree with the State that "Lee suffered no prejudice because the impeachment on which he relies did not undermine the elements at issue in his trial." D.B. testified that she woke up to find Lee in the process of having intercourse with her. Render testified that D.B. came into the bedroom crying and shaking and said that Lee had tried "to get some," a clear reference to sex. The physical evidence showed that Lee and D.B. had intercourse. The inconsistencies to which Lee points do not bear on the central issue in the case—whether D.B. was conscious when Lee began having sexual intercourse with her. There is no reasonably probability that, had Lee's lawyer cross-examined D.B. on all of these points, the result of the proceeding would have been different. The

circuit court properly denied Lee's motion without a hearing because he has not shown that he was prejudiced.[2]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[2] Lee's appellate attorney cited to a per curiam opinion of this court in her brief. This violates our rules. An attorney may cite to an unpublished opinion for its persuasive value if it was issued on or after July 1, 2009, and *was authored by a member of a three-judge panel or by a single judge* under WIS. STAT. § 752.31(2). *See* WIS. STAT. RULE 809.23(3)(b). Per curiam opinions are not authored opinions for purposes of the rule. ***Id.***