COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1990-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN DULIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Modified, remanded with directions and, as modified, affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Nathan Dulin has appealed pro se from a judgment convicting him upon a guilty plea of one count of second-degree sexual assault of a child in violation of § 948.02(2), STATS., arising from an offense committed in

January 1994. Three additional counts of second-degree sexual assault involving the same victim were dismissed and read in for purposes of sentencing.

Initially, we note that the written judgment of conviction states that Dulin was convicted of counts one and two of the four charges of second-degree sexual assault which were filed against him in this case. The written judgment indicates that counts three and four were dismissed but read in for purposes of sentencing. As acknowledged by the State in its respondent's brief, the written judgment is erroneous because Dulin in fact ultimately pled guilty to only the first count of second-degree sexual assault, with the remaining three charges against him dismissed and read in. Because the trial court orally ordered entry of judgment on count one of the four charges, with the remaining three counts dismissed and read in for purposes of sentencing, its oral pronouncement controls the written judgment. *See* ***State v. Perry***, 136 Wis.2d 92, 114-15, 401 N.W.2d 748, 758 (1987). This court therefore orders that the written judgment of conviction be modified to reflect that Dulin was convicted of the first count of second-degree sexual assault in violation of § 948.02(2), STATS., with the remaining three counts of second-degree sexual assault dismissed and read in. As modified, the judgment of conviction is affirmed. On remand, the clerk of the circuit court shall amend the written judgment accordingly.

Although we modify the written judgment to accurately reflect the trial court's disposition of this case, we reject Dulin's challenges to his conviction. Dulin's first argument is that the State never proved every element of his guilt beyond a reasonable doubt. However, when, as here, a defendant is convicted upon a guilty plea, the trial court need only find a sufficient factual basis for the plea. *See* ***Broadie v. State,*** 68 Wis.2d 420, 423, 228 N.W.2d 687, 689 (1975). An adequate factual basis exists when an inculpatory inference can reasonably be drawn from

the facts, even if a contrary inference could also be drawn. *See* ***State v. Spears,*** 147 Wis.2d 429, 435, 433 N.W.2d 595, 598 (Ct. App. 1988).

Dulin pled guilty to count one of the criminal complaint, which charged him with having sexual intercourse with Melvin J.L., a child under the age of sixteen, in violation of § 948.02(2), STATS., in January 1994. The complaint, which was accepted as the factual basis for the plea, alleged that the fifteen-year-old Melvin told the police that in January 1994 Dulin had anal intercourse with him for fifteen to twenty minutes in exchange for a six-pack of soda. Because having sexual intercourse with a child under the age of sixteen is a strict liability offense under § 948.02(2), this statement was sufficient to provide a factual basis for Dulin's guilty plea.

Dulin appears to believe that the factual basis for his plea was negated because after he initially entered a guilty plea to two of the four charges against him, DNA test results were obtained which revealed that anal swabs taken from the victim contained the DNA of someone other than Dulin, and not of Dulin. However, contrary to Dulin's belief, this evidence did not raise an exculpatory inference as to the January 1994 incident to which he pled guilty. The anal swabs were taken on March 29, 1994, when Melvin alleged that Dulin again had anal intercourse with him. Because the swabs related only to the March 29, 1994 incident, the DNA evidence provided no basis to conclude that Dulin did not have intercourse with Melvin in January 1994, as alleged in the complaint. Moreover, in his statement regarding the March 29, 1994 incident, Melvin indicated that Dulin had just commenced having anal intercourse with him when another inmate of the Ethan Allen school appeared at the door, causing Dulin to withdraw from the intercourse. Melvin's statement was corroborated by the statement of the other inmate, who described discovering Melvin and Dulin in

incriminating positions. Because this evidence indicated that Dulin's intercourse with Melvin was interrupted before ejaculation, the fact that DNA from his sperm was not found in the anal swab taken from Melvin does not mean that the alleged intercourse did not occur. Similarly, the fact that Melvin may have had intercourse with someone other than Dulin did not mean that he did not also have intercourse with Dulin, as he alleged.

Dulin's judgment of conviction therefore cannot be disturbed on the grounds that it lacked a factual basis. Contrary to Dulin's contentions, it also cannot be disturbed on the grounds that Melvin committed perjury at the preliminary hearing by testifying that he had intercourse with no one but Dulin. Melvin testified at the preliminary hearing that he had sexual intercourse with Dulin on four occasions, but was not questioned concerning intercourse with anyone else and never denied that he had intercourse with someone in addition to Dulin.

Dulin's final claim is that his trial counsel rendered ineffective assistance, apparently by failing to advise him to withdraw his guilty plea and go to trial after discovery of the DNA test results. To establish a claim of ineffective assistance, a defendant who has entered a guilty plea must show that counsel's performance was both deficient and prejudicial. *See* ***Hill v. Lockhart,*** 474 U.S. 52, 58 (1985). The deficiency prong asks whether counsel's performance fell below an objective standard of reasonableness. *See* ***id.*** at 57. The prejudice prong focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea. *See* ***id.*** at 59.

These issues present mixed questions of fact and law. We will not reverse the trial court's underlying factual findings unless they are clearly

erroneous. *See* ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The ultimate determination of whether the conduct of an attorney constitutes ineffective assistance is a question of law which we review de novo. *See* ***id.*** at 128, 449 N.W.2d at 848.

The record indicates that after the DNA test results became known, trial counsel obtained Dulin's consent to file a motion to withdraw his guilty pleas, which had previously been entered to two counts. However, Dulin subsequently appeared in court and indicated that he wanted to withdraw his motion. In exchange, one of the counts to which he had initially pled guilty was dismissed, leaving him convicted of only the first sexual assault charge. Dulin personally agreed on the record that he wanted to withdraw his motion to withdraw, wanted to retain his guilty plea to count one, and wanted to proceed to sentencing on that count.

The trial court properly determined that nothing in these proceedings demonstrated ineffective assistance by trial counsel. As indicated by trial counsel at the postconviction hearing, although the DNA test results were favorable to Dulin, they were not exculpatory. For the reasons already discussed, they did not establish that he was innocent of the March 29, 1994 assault, much less the three prior assaults. Moreover, the trial court had already ruled that evidence of two prior sexual assaults committed by Dulin, one of which occurred at the Ethan Allen school and the other involving violence, was admissible. As recognized by counsel, admission of this other acts evidence was very detrimental to Dulin's case. While trial counsel had filed a motion to reconsider that ruling which was not yet decided when the guilty pleas were entered, he could reasonably conclude that he was unlikely to prevail on a motion to reconsider, a conclusion

corroborated by the trial court at the postconviction hearing when it indicated that it was unlikely to reverse itself.

In light of the evidence against Dulin and the limited value of the DNA results when viewed in the context of all of the evidence, trial counsel cannot be deemed to have proceeded unreasonably or deficiently by failing to advise Dulin to go to trial or to forcefully recommend that he do so. Furthermore, when a defendant claims that he or she should be able to withdraw a guilty plea based on ineffective assistance of trial counsel, the defendant can satisfy the prejudice prong only by showing a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *See* ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996). In this case, trial counsel testified at the postconviction hearing that Dulin wanted him to use the DNA evidence to get a better deal permitting him to plead guilty to only one count and was pleased when the State agreed to such an arrangement. Counsel testified that the final decision to accept the new plea arrangement was Dulin's, an allegation which was corroborated by Dulin's personal assent to the new plea arrangement at the hearing held in the trial court on September 6, 1995. Dulin's claim of ineffective assistance of trial counsel must therefore be rejected.

By the Court.—Judgment modified, remanded with directions and, as modified, affirmed.

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