COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3694-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ESTEBAN R.M.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Esteban R.M. appeals from a judgment of conviction of first-degree sexual assault of a child and from an order denying his postconviction motion. He argues that he was denied the effective assistance of counsel, that the trial court erroneously exercised its discretion in allowing expert

testimony and in sentencing him, and that the trial court should have recused itself from hearing the postconviction motion. We affirm the judgment and the order.

Esteban's daughter reported at school and to police officials instances when Esteban touched her vaginal area and buttocks both over and under her clothes. Esteban was interviewed at the police station about such conduct. A written statement was produced and signed by Esteban in which he admitted he had "grabbed and pinched" his daughter on her butt and rubbed her vagina. At trial, Esteban contested the accuracy of the contents of the statement on the grounds that he has a poor grasp of both oral and written English and the police interrogator misunderstood him. However, no pretrial motion to suppress admission of the statement was made. Esteban claims that trial counsel was ineffective for not moving to suppress the statement to the police.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) that his or her counsel's action constituted deficient performance and (2) that the deficiency prejudiced his or her defense. *See* ***State v. Hubanks***, 173 Wis.2d 1, 24-25, 496 N.W.2d 96, 104 (Ct. App. 1992). The questions of whether counsel's actions were deficient and whether such actions prejudiced the defense are questions of law which we review de novo. *See* ***id.*** at 25, 496 N.W.2d at 104-05.

When we address a claim of ineffective assistance of counsel, we determine whether trial counsel's performance fell below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. *See* ***id.*** We presume that counsel's performance was

satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See* ***id.***

To establish prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *See* ***State v. Pitsch***, 124 Wis.2d 628, 642, 369 N.W.2d 711, 718 (1985). But this is not an outcome determinative standard. *See* ***id.*** Rather, reasonable probability contemplates a probability sufficient to undermine confidence in the outcome. *See* ***id.*** at 642, 369 N.W.2d at 719. If we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient. *See* ***State v. Kuhn***, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993).

Esteban argues that his attorney had sufficient facts on which to base a motion to suppress the written statement. In a conference with Esteban and a Spanish interpreter for the sole purpose of reviewing the statement, counsel was made aware that Esteban could not read or understand the statement. Esteban also told his attorney that he had not used certain words included in the statement. Esteban told counsel that he had only signed the statement because the police indicated that if he cooperated his daughter and wife would be allowed to go home.

The alleged grounds for suppression appear to be twofold: that the statement was coerced by promises that Esteban and his family could go home if he cooperated and that Esteban lacked a sufficient understanding of English to voluntarily and knowingly adopt the statement as his own. The determination of whether a custodial statement was voluntarily made is one of ultimate

constitutional fact which an appellate court determines de novo. *See* ***State v. Santiago***, 206 Wis.2d 3, 18, 556 N.W.2d 687, 692 (1996). There is no suggestion here that Esteban was not adequately informed of, and knowingly and voluntarily waived, his ***Miranda*** rights. Thus, we need only look at whether the statement was given voluntarily. *See* ***Santiago***, 206 Wis.2d at 18-19, 556 N.W.2d at 692-93. If suppression was not required, trial counsel was not deficient for not filing a motion to suppress. *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).

"In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). The determination of whether a confession is voluntary is made by examining the totality of the circumstances and requires the court to balance the personal characteristics of the defendant against the pressures imposed by police in order to induce him or her to respond to the questioning. *See* ***id.*** at 236, 401 N.W.2d at 766. However, if there is no evidence of either physical or psychological coercive tactics by the detectives, the balancing test is unnecessary. *See* ***id.*** at 239-40, 401 N.W.2d at 767; *see also* ***State v. Deets***, 187 Wis.2d 630, 636, 523 N.W.2d 180, 182 (Ct. App. 1994).

It is not coercive conduct for an officer to invite a defendant's cooperation by either informing the defendant of potential benefits of cooperation or suggesting that things will be easier on the victim. *See* ***id.*** at 636-37, 523 N.W.2d at 183. Thus, Esteban was not subject to coercive tactics when told that his family could go home if he cooperated. The statement was not subject to suppression on this ground.

With respect to Esteban's understanding of English, the record does not support the claim that Esteban could not understand the statement. He acknowledged during the police interview that he was able to read, write and understand English. The officer indicated no trouble understanding Esteban or communicating with him. The officer read the statement to Esteban. At the postconviction motion hearing, the interpreter testified that Esteban understands about seventy to eighty percent of what is said in English and experiences difficulty with sophisticated or "legalese" words. The statement did not contain any such words. Esteban read the statement aloud with another officer present before signing it. Moreover, Esteban read the statement at trial. Although he was unable to read or missed the words "detective," "grabbed," "areas," "honest," "both," "vagina," and "aroused," there was no showing that he was unable to understand that he was admitting that he had touched his daughter. Any claim that Esteban did not understand the statement before signing it would have been without merit. Therefore, trial counsel was not deficient for not pursing a motion to suppress the statement.

For an additional reason we conclude that Esteban was not prejudiced by counsel's failure to move to suppress the statement. The admission of the statement was harmless in light of the daughter's statement that sexual contact occurred. Although the daughter had delayed reporting and recanted her statement at trial, expert testimony about a child's delayed reporting and recantation supported the prosecution's theory. Also, Esteban testified at trial and denied sexual contact. The whole issue of what he actually said to the police officer and his ability to understand English was explored at trial. Our confidence in the outcome is not undermined by trial counsel's failure to seek suppression of the statement.

Esteban contends that trial counsel should have objected to the police officer's reading of the statement during his trial testimony. Trial counsel testified that he did not object because he thought an objection was useless and that the statement would go to the jury in any event. The objection would have been useless because the statement was admissible as a party admission. *See* ***State v. Johnson***, 121 Wis.2d 237, 256, 358 N.W.2d 824, 833 (Ct. App. 1984). It was within the trial court's discretion to determine how the statement would be published to the jury. Further, Esteban was not prejudiced by counsel's failure to object to the officer reading the statement because the statement could be and was sent to the jury. *See* ***State v. Jensen***, 147 Wis.2d 240, 259-60, 432 N.W.2d 913, 921 (1988) (a trial court has discretion to send a written confession to the jury room).

Esteban argues that a timely motion for substitution of judge should have been filed by the first attorney assigned to handle his case. The trial court found that Esteban had not timely informed his attorney that he wanted a new judge. Substitution as of right can be requested within fifteen days of notice of the judicial assignment. *See* § 971.20(5), STATS. Notice that Judge Marianne Becker was assigned to the case was given on March 10, 1995. Counsel testified that Esteban never told counsel about previous bad experiences before Judge Becker and that only after Judge Becker raised Esteban's bail did Esteban indicate that he wanted a new judge. Bail was raised on April 19, 1995. The fifteen days for filing a substitution request had passed. Trial counsel was not deficient for not filing a timely substitution request when Esteban did not timely inform counsel that substitution was desired.

The trial court also found that judicial substitution was discussed between Esteban and the second attorney appointed to represent him and that a

choice was made not to seek substitution. The second attorney testified that Esteban expressed that his first attorney had failed to seek judicial substitution despite being requested to do so. Counsel testified that although he talked with Esteban about the types of cases in which Esteban had previously appeared in front of Judge Becker, he concluded that no grounds existed to seek substitution for cause. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). We are obligated to examine counsel's conduct to be sure that it is more than just acting upon a whim. *See* ***id.*** We conclude that the decision not to pursue a motion for judicial substitution was based upon rationality founded on the facts and law. Therefore, Esteban was not deprived of the effective assistance of counsel on the issue of judicial substitution.

The final claim of ineffective assistance is that trial counsel did not retain an expert to rebut the prosecution's expert testimony on delayed reporting and recantation by child sexual assault victims. In essence, Esteban is claiming that trial counsel failed to investigate potential rebuttal evidence. However, Esteban has not made a record of what additional investigation would have turned up and whether the expert testimony he suggests is even available. His claim of ineffective counsel fails. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994) (a defendant who alleges a failure to investigate must establish what the investigation would have revealed and how it would have altered the outcome of the trial). Additionally, Esteban did not specifically argue this issue to the trial court in his postconviction motion and it cannot now be raised. *See* ***State v. Rogers***, 196 Wis.2d 817, 827, 539 N.W.2d 897, 901 (Ct. App.

1995) (waiver rule exists so that this court does not blind side trial courts with reversals based on theories that did not originate in their forum).

At trial an expert testified on the delayed reporting and recantation tendencies of child sexual assault victims. Esteban argues that this was an erroneous exercise of the trial court's discretion because the reasons why a child may delay reporting sexual abuse or recant allegations are matters within the general knowledge of the jury. ***Jensen***, 147 Wis.2d at 256-57, 432 N.W.2d at 920, teaches that commonly observed indicators of sexual assault of children may be presented to a jury by an expert. Such testimony "may prevent false assumptions on the part of the fact finder regarding the meaning of the complainant's behavior and does not constitute an opinion about the guilt of the defendant." ***Id.*** at 251, 432 N.W.2d at 918. The expert's testimony here stayed within the parameters laid out in ***Jensen***. We conclude that the trial court correctly exercised its discretion in admitting the expert testimony.

Esteban requests a new trial in the interests of justice. *See* § 752.35, STATS. A final catchall plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed. *See* ***State v. Marhal***, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992).

Esteban contends that during pretrial, trial and sentencing proceedings, the trial court exhibited bias against him. He argues that his right to due process was violated by such partiality and that the trial court should have recused itself from hearing his postconviction motion.

Section 757.19(2)(g), STATS., requires a judge to recuse himself or herself when the "judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This is a subjective test.

See ***State v. American TV & Appliance***, 151 Wis.2d 175, 182, 443 N.W.2d 662, 665 (1989); *see also* ***State v. Harrell***, 199 Wis.2d 654, 658, 546 N.W.2d 115, 116-17 (1996). When reviewing a claim for disqualification based on the subjective portion of the statute, the reviewing court must objectively decide if the judge went through the required exercise of making a subjective determination. *See* ***id.*** at 664, 546 N.W.2d at 119. Judge Becker determined that she could act in an impartial manner on Esteban's postconviction motion. There were no grounds for recusal under § 757.19(2)(g).

An objective test applies to a due process claim that the judge was biased. *See* ***State v. McBride***, 187 Wis.2d 409, 416, 523 N.W.2d 106, 110 (Ct. App. 1994). There is a presumption that a judge is free of bias and prejudice. *See* ***id.*** at 414, 523 N.W.2d at 109. To overcome the presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is prejudiced or biased. *See* ***id.*** at 415, 523 N.W.2d at 109. "Merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient." ***Id.*** at 416, 523 N.W.2d at 110.

Esteban contends that Judge Becker's facial expressions and body language during the trial and in front of the jury unfairly prejudiced him. No specific instances are cited. The jury was instructed to disregard any impression of the judge's opinion on guilt or innocence. We presume that the jury followed the instruction given by the trial court. *See* ***State v. Smith***, 170 Wis.2d 701, 719, 490 N.W.2d 40, 48 (Ct. App. 1992). Moreover, there is not one instance where the trial court ruled in a manner which demonstrated actual bias. We reject Esteban's claim that his right to due process was violated.

Esteban's final claim is that the forty-year prison term is excessive, harsh and the result of an erroneous exercise of discretion. Sentencing is committed to the discretion of the sentencing court, and appellate review is limited to determining whether there was a misuse of discretion. *See* ***State v. J.E.B.***, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). A strong presumption of reasonableness is afforded sentencing decisions because the trial court is in the best position to consider the relevant factors and assess the defendant's demeanor. *See* ***State v. Setagord***, 211 Wis.2d 397, 418, 565 N.W.2d 506, 514 (1997). The three primary factors to be considered are the gravity of the offense, including the effect on the victim; the character of the offender, including his or her rehabilitative needs and the interests of deterrence; and the need for protecting the public. *See* ***id.*** at 416, 565 N.W.2d at 514. To overturn a sentence, a defendant must show some unreasonable or unjustifiable basis for the sentence in the record. *See* ***State v. Petrone***, 161 Wis.2d 530, 563, 468 N.W.2d 676, 689 (1991).

Esteban cites numerous comments made by the trial court which he contends exhibit unwarranted emotional ardor in the sentencing proceedings. He claims that the maximum sentence was meted out only because of the trial court's extreme dislike of him.

The State concedes that the trial court was contemptuous of Esteban. However, there is no precedent that the trial court must impose sentence in a completely dispassionate manner. The relevant inquiry is whether the emotion displayed rises to the level of bias or partiality. *See* ***State v. Sinks***, 168 Wis.2d 245, 257, 483 N.W.2d 286, 291 (Ct. App. 1992). We conclude that it did not.

In addition to the nature of the offense, the trial court considered Esteban's criminal record, his failure on probation, his character and demeanor,

and uncharged conduct. These were proper additional considerations. *See* ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994). It is apparent that the trial court felt the maximum sentence was necessary to protect Esteban's family and the public from his inability to control his behavior. The sentence is based on appropriate factors and the facts of record and is therefore a proper exercise of discretion.

By the Court.—Judgment and order affirmed.

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