COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0281-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM SPEENER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. William Speener appeals from a judgment entered after a jury convicted him of two counts of first-degree sexual assault of a child and one count of exposing genitals to a child, contrary to §§ 948.02(1) and 948.10, STATS. He also appeals from an order denying his postconviction motion alleging ineffective assistance of trial counsel. Speener claims: (1) the trial court erred in

denying his claim that he received ineffective assistance of trial counsel; and (2) his convictions should be reversed in the interests of justice. Because Speener received effective assistance of trial counsel and we see no reason to exercise our discretionary reversal powers under § 752.35, STATS., we affirm.

I. BACKGROUND

Speener was charged with two counts of sexual assault of a child and one count of exposing genitals to a child stemming from incidents that occurred on February 28, 1995. The victim, J.R., was the five-year-old daughter of his long-time girlfriend, Linda R. Trial was to a jury which found him guilty of both counts. Speener filed a postconviction motion alleging ineffective assistance of trial counsel. He claimed that: (1) trial counsel should have questioned or asked the court to question J.R. about her understanding of the difference between truth and lies; (2) trial counsel failed to question or ask the court to question J.R. about whether her relatives coached her to make false accusations; (3) trial counsel failed to investigate and cross-examine on the issue of whether J.R.'s grandmother and great aunt coached J.R. to make false allegations; (4) trial counsel argued the coaching theory without producing any evidence to support the claim; (5) trial counsel failed to investigate whether J.R. had given prior inconsistent statements or recanted altogether; (6) trial counsel failed to record pre-trial conversations with Linda R., which might have been inconsistent with her trial testimony; (7) trial counsel failed to request that the jury be polled; and (8) trial counsel represented in opening statements that Speener would testify and, when he did not testify, that representation made Speener look guilty. The trial court held a ***Machner*** hearing,[1]

[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

where both Speener and his trial counsel testified. The trial court concluded that Speener received effective assistance. Speener now appeals.

II. DISCUSSION

A. Ineffective Assistance.

In order to establish that he did not receive effective assistance of counsel, Speener must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). A lawyer's performance is not deficient unless he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if Speener can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id***. Stated another way, to satisfy the prejudice-prong, Speener must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 (citation omitted).

In assessing Speener's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are

clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

1. Failure to establish J.R.'s understanding of truth and lies.

Speener argues that his trial counsel should have taken additional steps to ensure that J.R. understood the difference between telling the truth and telling lies. Speener claims that trial counsel's failure to do so constituted ineffective assistance. We do not agree.

As noted in the trial court's postconviction motion decision, it was made "clear that the victim had an understanding of the truthfulness, right and wrong and so forth." The record supports this conclusion. The victim was questioned sufficiently to determine her understanding. J.R. demonstrated her understanding of truth and lies when she answered questions regarding whether her mother was wearing a dress, a winter coat, or a funny hat with fruit on top. J.R. testified that it would be "wrong" if she said the district attorney was wearing a red dress when in fact her dress was blue and white. J.R. agreed to testify only about things that are true. When asked whether she was telling the truth or a lie, she responded that she was telling the truth.

This was sufficient to establish J.R.'s understanding of what is true and what is a lie. In addition, trial counsel did engage in some cross-examination of J.R. He was able to elicit definitive answers from her regarding the color of the doll's clothes, and what J.R. was wearing on the day of the assaults.

2. Failure to question J.R. regarding coaching allegations.

Speener also claims counsel was ineffective for not taking some action to inquire whether J.R. was coached by relatives into making false allegations. We reject this claim.

The record demonstrates that trial counsel did bring up the issue that J.R. may have been coached by relatives into making false allegations. This was implied during counsel's cross-examination of J.R., who was unable to answer questions during the morning, but after a lunch break, had no difficulty testifying. Counsel asked J.R. why she was unable to testify before lunch, but after lunch had no difficulty answering questions. J.R. responded "cuz." Counsel asked whether J.R. had talked to people during the lunch hour, to which J.R. stated that she had. Counsel also asked J.R. about her grandmother, with whom J.R. stayed after the incident. J.R. testified that her grandmother did talk to her about the incident. Counsel specifically inquired whether her grandmother told J.R. what to say. J.R. answered "[n]o." Counsel's decision to accept the denial without pressing the point was reasonable trial strategy. Repeated questions on this point might have resulted in repeated denials, which would have further deflated his ability to argue the coaching theory in closing arguments.

Based on the foregoing, we conclude that counsel's conduct regarding asking J.R. about coaching was not deficient.

3. Failure to investigate/cross-examine grandmother and great aunt on coaching.

Speener argues that his trial counsel was ineffective for failing to investigate or cross-examine J.R.'s grandmother and great aunt on the coaching theory. We are not persuaded.

Trial counsel testified at the ***Machner*** hearing that there was no factual proof to support the defense theory that the grandmother and great aunt had coached J.R. into making false allegations. There was no extrinsic proof, no outside witnesses to testify that either relative had manipulated J.R. into lying, and no documentation that this had occurred. Accordingly, trial counsel's strategic decision not to hire an investigator and not to cross-examine the relatives on this point was not deficient performance. His questioning of J.R. as to whether her grandmother had told her what to say had already elicited a negative response. There was no reason to ask the same question of the relatives who, most likely, would have similarly answered the question "no."

Because of the lack of any extrinsic evidence to support the coaching theory, trial counsel's best course of conduct was to raise the implication of coaching and argue this theory during closing, when the relative witnesses no longer had the opportunity to deny that coaching had occurred.

4. Arguing coaching without any evidence.

Speener argues that trial counsel was ineffective for arguing that J.R. had been coached to make false allegations without producing any evidence to support this argument. We do not agree.

Given Speener's position that the assaults did not occur, a coaching theory was a logical defense. Despite the fact that no extrinsic evidence existed to support this theory, trial counsel's argument was not totally without reason. Trial counsel had raised the implication that J.R. had been coached when she was unable to testify during the morning, but after talking with people at lunch, had no problem testifying in the afternoon. This was further supported by J.R.'s inability to explain why she was willing to speak after lunch, but not before.

5. Failure to investigate J.R.'s inconsistent statements or recantation.

Speener argues that trial counsel was ineffective for failing to investigate or follow-up on information that J.R. may have given inconsistent statements or recanted altogether. We reject this claim because Speener fails to cite anything specific with regard to this allegation. He fails to allege what inconsistent statements were made, what the recantation was or any circumstances surrounding it. Accordingly, we cannot determine whether trial counsel's conduct in this regard was deficient and must reject Speener's claim.

6. Failure to record conversations with Linda R.

Speener claims trial counsel was ineffective for failing to record pre-trial conversations with J.R.'s mother, Linda, which apparently were supportive of Speener's innocence and inconsistent with Linda's trial testimony. Speener alleges that if these conversations would have been recorded, they could have been used against Linda at trial as prior inconsistent statements. We reject this claim.

Trial counsel stated that both he and Speener believed that Linda might be helpful at trial or might not show up for trial. Trial counsel's strategic decision, therefore, to forgo any formal attempt to record or preserve her testimony does not constitute deficient performance.

7. Failure to poll the jury.

Speener claims trial counsel was ineffective for failing to poll the jury, against his wishes. Based on our review, we conclude that Speener waived the right to have the jury polled and, therefore, we reject his claim.

After the verdict was rendered, the trial court, in Speener's presence, asked whether there was a request to poll the jury. Trial counsel, after a brief discussion with Speener stated: "There is no need to poll the jury." At the ***Machner*** hearing, Speener testified that he had asked his attorney to poll the jury. Trial counsel testified that he had no recollection of being asked to poll the jury, but that if Speener had asked, there would have been "no reason not to poll the jury." The trial court believed trial counsel to be more credible on this point. This credibility determination is more appropriately left to the trial court. *See* ***Dejmal v. Merta***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980).

Moreover, a defendant's right to have the jury polled can be waived. *See* ***State v. Wojtalewicz***, 127 Wis.2d 344, 346, 379 N.W.2d 338, 339 (Ct. App. 1985). Where a defendant is represented by counsel, the decision to waive this right is delegated to counsel. *See* ***State v. Yang***, 201 Wis.2d 725, 744-45, 549 N.W.2d 769, 776-77 (Ct. App. 1996). Here, Speener was present when the trial court asked whether the jury should be polled. He sat silent when counsel told the court that a polling was not necessary. Speener delegated the decision to trial counsel, and acceded in open court to counsel's statement not to poll the jury. Accordingly, this right was waived.

8. Counsel's statement in opening regarding Speener testifying.

Speener argues that counsel was ineffective by indicating in his opening that Speener would take the stand to deny the allegations when it turned out that Speener waived his right to testify. We are not persuaded.

During the defense opening, trial counsel stated: "My client, William Speener, will not testify until after all of the evidence is in by the State of Wisconsin." This statement was not a promise to the jury that Speener would get

on the stand and deny the allegations against him. This was purely a tactical move. Often times, a defendant's decision to testify is not finalized until after all the evidence has been introduced. Counsel did not promise to put Speener on the stand. Rather, his statement was a caution to the jury not to prejudge the case until it was completed.

B. Interest of Justice.

Speener also asks this court to exercise its discretionary power under § 752.35, STATS., to reverse his convictions in the interest of justice. We decline to do so. Our power of discretionary reversal should be exercised only in exceptional cases. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990). Here, Speener's "interest of justice claim" is simply an extension of an argument which we have already rejected and, therefore, does not fall into the "exceptional cases" category.

By the Court.—Judgment and order affirmed.

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