COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0940-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CALVIN R. CLEMONS,

DEFENDANT-APPELLANT.

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

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

WEDEMEYER, P.J. Calvin R. Clemons appeals from a judgment entered after a jury found him guilty of two counts of second-degree sexual assault of a child, contrary to § 948.02(2), STATS. He also appeals from an order denying his postconviction motion. Clemons claims that: (1) the trial court erroneously exercised its discretion when it admitted certain testimony into evidence; and

(2) he received ineffective assistance of trial counsel. Because the trial court did not erroneously exercise its discretion in admitting the challenged testimony, and because Clemons received effective assistance of trial counsel, we affirm.

I. BACKGROUND

According to Zarita O., the thirteen-year-old victim in this case, Clemons assaulted her on several occasions. The first occurred on March 29, 1996, after she came home from school. Clemons, her mother's live-in boyfriend, and Zarita were alone in the home when the first assault occurred. Clemons asked Zarita to get him a glass of water and bring it to him in his bedroom. When Zarita complied, Clemons asked her to come closer and then put his hand down her shirt and touched her bare breasts. Then he put his hand down her pants and touched her vagina. Zarita testified that she ran from the room and that Clemons followed her and threatened to kill her and her family if she told anyone.

Zarita also testified that a second incident, similar to the first, occurred the following morning, March 30, 1996, while she was alone in the residence with Clemons. He asked her to bring him a glass of water into his bedroom. When she did, he again touched her breasts and vagina. These two incidents formed the basis for the two charges. Zarita also testified to other, uncharged incidents. Zarita testified regarding a third incident that took place on April 11, 1996, where similar touching occurred. She also alleged that a fourth incident occurred where Clemons threw her on the bed and tried to rape her.

On April 21, 1996, Zarita told her ten-year-old sister, Clatrice, about the assaults. Clatrice testified at trial about this conversation, stating that Zarita told her that Clemons had touched Zarita on her breasts and her bottom. She testified the conversation occurred while the two sisters were cleaning their room.

Clatrice related that Zarita said Clemons would kill Zarita and her family if Zarita told anyone and that Zarita was crying loudly and emotionally when relating this information to Clatrice. Both girls admitted that they were angry with Clemons for ordering them to clean their room.

Shortly after telling Clatrice, Zarita also told her mother about the incidents. Zarita's mother testified that Zarita was crying when she told her about the assaults.

Clemons objected to both Clatrice and her mother testifying about what Zarita told them. The trial court, however, admitted the statements under the excited utterance exception to the hearsay rule.

Clemons was convicted on both counts. Originally, he filed his appeal alleging solely evidentiary error in admitting the challenged testimony. However, prior to disposition of the appeal, Clemons requested that the case be remanded to the trial court for further postconviction proceedings. That request was granted and the case was remanded.

Upon remand, Clemons filed a postconviction motion alleging ineffective assistance of counsel. Specifically, he argued that his trial counsel was ineffective because he did not know that Clemons was entitled to five peremptory strikes, and thus only struck four jurors peremptorily. The trial court held that this error was not prejudicial and denied Clemons's motion. Clemons now appeals.

II. DISCUSSION

A. Evidentiary Rulings.

Clemons claims that the trial court erroneously exercised its discretion when it admitted Clatrice's and her mother's testimony regarding what Zarita told them about the assaults. Clemons argues that the trial court's decision to admit this testimony as an excited utterance was in error because none of the criteria set forth in the ***State v. Gerald L.C.***, 194 Wis.2d 548, 535 N.W.2d 777 (Ct. App. 1995) case was present here. We are not persuaded.

Whether to admit hearsay statements under a hearsay exception is a discretionary determination left to the trial court. *See* ***State v. Moats***, 156 Wis.2d 74, 96, 457 N.W.2d 299, 309 (1990). We will not reverse a discretionary ruling unless the trial court erroneously exercised its discretion. *See* ***State v. Sorenson***, 143 Wis.2d 226, 240, 421 N.W.2d 77, 82 (1988). If there is a reasonable basis for the decision in the record, and the trial court applied the pertinent facts to the law, then the trial court did not erroneously exercise its discretion. *See* ***id.*** Our standard of review is one of deference because the trial court is better able to weigh the reliability of circumstances surrounding out-of-court statements. *See* ***State v. Huntington***, 216 Wis.2d 671, 680, 575 N.W.2d 268, 272 (1998).

In order to admit a statement as an excited utterance, three requirements must be met: (1) there must be a startling event or condition; (2) the out-of-court statement must relate to the startling event or condition; and (3) the declarant must still be under the stress of excitement caused by the event or condition when the statement is made. *See* ***id.*** at 681-82, 575 N.W.2d at 273. The

dispute at issue in the instant case surrounds the third factor. Clemons argues that the facts do not support the trial court's finding that Zarita was still under the stress of excitement when she told Clatrice and her mother about the assaults. He refers to the ***Gerald L.C.*** factors in support of this argument.

The ***Huntington*** court addresses an argument similar to Clemons's argument here relative to the application of the ***Gerald L.C.*** factors. In ***Gerald L.C.***, this court determined, after a survey of the law governing the excited utterance exception in child abuse cases, that three factors are usually present when hearsay statements constitute an excited utterance: (1) the child is under ten years old; (2) the child reports the sexual abuse within one week of the last abusive incident; and (3) the child first reports the abuse to his or her mother. *See* ***Gerald L.C.***, 194 Wis.2d at 557, 535 N.W.2d at 779.

In ***Huntington***, our supreme court affirmed the trial court's admission of a child victim's statements to others under the excited utterance rule despite the fact that the ***Gerald L.C.*** factors were not present. In ***Huntington***, the child victim was eleven, reported the event two weeks after the last assault, and first reported the abuse to a cousin and someone's aunt. *See* ***Huntington***, 216 Wis.2d at 683-84, 575 N.W.2d at 273-74.

Our supreme court ruled that the ***Gerald L.C.*** factors are not dispositive. *See* ***Huntington*** at 684, 575 N.W.2d at 274. Rather, it held that the determinative fact is whether the statements "demonstrate sufficient trustworthiness to be admitted under the excited utterance exception." ***Id.*** Where the trial court reaches a reasonable conclusion concerning the statements and sets forth a reasonable basis for admission, the trial court's ruling does not constitute an erroneous exercise of discretion. *See* ***id.*** at 685, 575 N.W.2d at 274.

We conclude that the trial court in the instant case set forth a reasonable basis for admitting the challenged statements, after application of the proper standard of law and, therefore, it did not erroneously exercise its discretion. The trial court determined that the challenged statements were "clearly statements made under the stress of the startling event." It reasoned that the delay between occurrence and reporting was not so great as to remove its application under the excited utterance rule.

The trial court's ruling is reasonable and in accord with the pertinent facts and applicable law. In the instant case, the delay between the last assault and reporting was ten days, four days less than the interim period of two weeks between the abuse and report of abuse in child sexual assault cases allowed in ***Huntington***. *See* ***Huntington***, 217 Wis.2d at 684, 575 N.W.2d at 274. Further, Zarita was crying and emotionally upset when she reported the abuse to her sister and her mother. This supports the trial court's finding that Zarita was still under the stress of excitement. Moreover, the reports to these family members occurred within a short period of time, so the fact that Zarita first disclosed the assaults to her sister, rather than her mother, should not be dispositive.[1] Nor should the fact that Zarita was thirteen years old be dispositive. The trial court found that Zarita was still under the stress of excitement of the incident. The record demonstrates additional factors specific to this case that support the trial court's finding. Zarita endured repeated assaults by a member of her household, Clemons threatened to kill her if she told anyone, and Zarita knew that Clemons had been violent in the past. Under all of these facts and circumstances, we cannot say that the trial

[1] It is also noted that Zarita claims to have told her best friend prior to reporting the assaults to her sister and mother. However, the best friend's testimony is unclear as to when the disclosure occurred.

court's ruling admitting the testimony under the excited utterance rule constituted an erroneous exercise of discretion.

B. Ineffective Assistance.

Clemons also argues that he received ineffective assistance of trial counsel because his trial counsel used only four peremptory strikes, when §§ 972.03 and 972.04(1), STATS., provides that each side was entitled to five peremptory strikes because an alternate juror was impaneled.[2] The trial court denied Clemons's ineffective assistance claim, ruling that Clemons failed to demonstrate prejudice. We agree.

In order to establish that he did not receive effective assistance of counsel, Clemons 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). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

---

[2] Section 972.03, STATS., provides in pertinent part:

> Each side is entitled to only 4 peremptory challenges except as otherwise provided in this section.… Each side shall be allowed one additional peremptory challenge if additional jurors are to be impaneled under s. 972.04 (1).

Section 972.04(1), STATS., provides in pertinent part:

> The number of jurors impaneled shall be prescribed in s. 756.096 (3) (a) or (am), whichever is applicable unless a lesser number has been stipulated and approved under s. 972.02 (2) or the court orders that additional jurors be impaneled. That number, plus the number of peremptory challenges available to all the parties, shall be called initially and maintained in the jury box by calling others to replace jurors excused for cause until all jurors have been examined.

Id. Even if Clemons 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, a "defendant 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." ***Id.*** at 694.

In assessing the defendant'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.

Here, the record contains an affidavit asserting that trial counsel was not aware of the statutory language granting each side an additional peremptory strike if additional jurors are impaneled. The affidavit asserts that if counsel had known of the statutory provision, he would have requested a fifth peremptory strike. The failure of counsel to know of such right constitutes deficient performance. Nonetheless, Clemons fails to assert how such deficient performance prejudiced the outcome. He argues instead that this error is presumptively prejudicial under ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997) and, therefore, he is entitled to a new trial. We disagree.

Contrary to Clemons's assertion, we conclude that ***Ramos*** does not control here because the instant case, unlike ***Ramos***, arose in the context of an ineffective assistance claim. In ***Ramos***, defense counsel moved to strike a juror for cause, but the trial court denied the request. *See* ***id.*** at 14-15, 564 N.W.2d at 329-30. The Wisconsin Supreme Court held that forcing defense counsel to use a peremptory challenge to correct a trial court error deprives the defendant of a statutorily granted right. *See* ***id.***

The automatic reversal rule, or "presumptively prejudiced" rule of ***Ramos*** does not apply here. The trial court and both counsel for Clemons and counsel for the State agreed to the jury selection procedure. All agreed to four peremptory strikes per side and the impaneling of one alternate juror. Clemons failed to object to the jury selection procedure and apparently neither the trial court nor the prosecutor were aware of the right to an extra peremptory strike. Because no one raised this right, each side was equally affected by the oversight.

We decline Clemons's invitation to adopt the ***Ramos*** automatic reversal rule when the case involves an ineffective assistance claim alleging deficient performance relative to jury selection. Rather, we adhere to the requirement that both parts of the ***Strickland*** test be satisfied.

Here, Clemons makes no showing that the final jury panel was biased or forced upon him. *See* ***State v. Traylor***, 170 Wis.2d 393, 400, 489 N.W.2d 626, 628-29 (Ct. App. 1992) (holding defendant must show prejudice flowing from ineffective assistance claim based on failure to move to strike jurors for cause). Accordingly, he has not demonstrated prejudice by trial counsel's deficient performance. Therefore, we reject his claim that he received ineffective assistance.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.