COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2144-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EQUINEES BOYLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: N. PATRICK CROOKS AND JOHN D. MCKAY, Judges.[1] *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Equinees Boyles appeals a judgment convicting him of second-degree sexual assault to a child, contrary to § 948.02(2), STATS., and

[1] Judge Crooks presided over the trial, and Judge McKay handled postconviction motions.

supplying cocaine to a person under eighteen, contrary to § 161.46(3), STATS., as a repeater, § 161.48(3), STATS. Boyles contends the State violated his due process rights by withholding ***Brady*** material. ***Brady v. Maryland***, 373 U.S. 83 (1963). He further asserts his trial counsel provided ineffective assistance and that he is entitled to a new trial in the interests of justice. We disagree with Boyles's contentions and affirm.

Boyles was convicted of second-degree sexual assault of and supplying cocaine to Renee S., a minor. Evidence about a sexual relationship between Boyles and Renee emerged as the police investigated Renee's father, Terry S., and his girlfriend, Estella Iddings regarding sexual acts in which the latter forced Renee to engage. Renee implicated Boyles as being involved in sexual encounters between her and Estella Iddings. Renee told investigators that Boyles "treated me really special," and that they got high together. According to Renee, they had an ongoing sexual relationship for between two and four months, and engaged in sexual intercourse approximately fifty times.

Terry and Iddings were prosecuted immediately; however, charges against Boyles were brought in August 1995, a year later. By the time Boyles was charged, the parallel prosecutions of Terry and Iddings were over. Boyles was originally charged with one count of each offense. The complaint alleged that the assaults occurred between October 19, 1992, Renee's fifteenth birthday, and March 31, 1993.

Boyles's trial counsel brought a motion to dismiss for lack of specificity. In response, the State moved to amend the information to charge one count of each crime per month for each month in the original charging period.

The court permitted the State to file the amended information and denied Boyles's renewed motion to dismiss.

At trial, substantial discrepancies existed regarding the timing of Boyles's relationship with Renee. The State's witnesses were unable to give consistent testimony about the date Renee met Boyles. Renee originally told police she met Boyles in "late winter of 1993," which the detective taking the statement understood to be "January, February, March of '93." At trial, she testified, "[M]y memory changed, and it's '92." When asked at trial whether the latest she could have met Boyles was the end of November 1992, she could not remember. Iddings testified that Renee did not meet Boyles until March 1993, but was impeached by a prior inconsistent statement in which she said she met Boyles in November 1992, and shortly thereafter observed a sexual incident between Renee and Boyles. Terry testified he met Boyles in May 1993. Boyles was ultimately convicted of one count of each offense to have occurred in December 1992. He was acquitted of the remaining ten counts.

At the postconviction hearing, Renee testified that when the 1992-93 school year began, she lived with her mother and attended East High. At some point, she moved in with her father and Estella and transferred to West High. She also testified that she did not begin to use cocaine until after she started at West, and she did not meet Boyles until after she started using cocaine.

On appeal, Boyles contends the State withheld exculpatory ***Brady*** material. Specifically, Boyles argues that the State withheld a psychological report prepared in a separate juvenile case involving Renee. The report contained information that Renee received counseling at Our Lady of Charity treatment center from August 1992 until December 1992, and that she lived with her mother

and attended East High School while receiving treatment. Boyles asserts this report contains relevant, material evidence calling into question whether he could have met and had sexual relations with Renee in December 1992. He further relies on ***Kyles v. Whitley***, 514 U.S. 419 (1995), to support his contention that the prosecutor in his case, although different than the prosecutor in Renee's juvenile case, should have discovered the report and disclosed it to the defense. Finally, he argues that because the prosecutor in Boyles's case actually admitted to having examined the juvenile case, he is presumed to be aware of any exculpatory information in that file.

This case involves the application of law to undisputed facts. It therefore presents a question of law reviewed de novo. ***Ball v. District No. 4, Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). The State's duty to disclose exculpatory evidence only covers evidence within its exclusive control. ***State v. Armstrong***, 110 Wis.2d 555, 580, 329 N.W.2d 386, 398 (1983). The government will not be found to have suppressed material information under ***Brady*** if that information was also available to the defense through the exercise of due diligence. *See* ***Westley v. Johnson***, 83 F.3d 714, 725-26 (5th Cir. 1996).

We conclude that the psychological report was not within the prosecutor's exclusive control. Rather, as a confidential report in Renee's juvenile file, it was in the court's exclusive control. It was not the prosecutor's to disclose. In addition, Boyles erroneously relies on ***Kyles*** to support its argument that the prosecutor should have discovered the report. In ***Kyles***, the Supreme Court held that a prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf *in that case*. ***Id***. at 437. Here, however, the psychological report was not prepared in anticipation of Boyles's case, but rather for Renee's separate juvenile case. We will not impose upon prosecutors a duty to

learn of any favorable evidence known to others acting on the government's behalf in different cases, even where those cases involve the same actors.

Moreover, although the Boyles prosecutor indicated that he had examined the juvenile case, at least for purposes of determining whether the State had reached an agreement with Renee to testify at Boyles's trial, there is nothing to indicate that he was familiar with the file's entire contents. The State was represented by different prosecutors in Boyles's and Renee's cases. Although the district attorney is presumed to be aware of the contents of his files, even if he has actually overlooked them, ***United States v. Agurs***, 427 U.S. 97, 110 (1976) (citing ***Giglio v. United States***, 405 U.S. 150, 154 (1972)), we decline to impute knowledge of the comprehensive contents of a juvenile file to a prosecutor not assigned to that case. Should a district attorney discover exculpatory material in a different case file during investigation, ***Brady*** compels disclosure. We, however, have not found any case requiring, and we are unwilling to hold, that each prosecutor is, for ***Brady*** purposes, *presumed* to be familiar with the contents of every file in the office, even those for which he or she is not directly responsible.

Finally, the information contained in the report was available to the defense through other sources. Boyles could have subpoenaed Renee's mother to establish when Renee lived with her. While the defense contends the mother's testimony would lack the corroborating effect of the psychological report, it cannot be presumed that the mother's testimony would be any less reliable than the hearsay information contained in the psychological report. Further, subject to parental objection, trial counsel could have subpoenaed school records establishing Renee's enrollment date at West High School. *See* § 118.125 (2)(j), STATS.

Boyles also contends his trial counsel provided ineffective assistance by failing to review the transcripts of the Iddings trial until the day of Boyles's trial.[2] He argues a reasonable attorney would have reviewed the transcripts and that the review would have led to the discovery of evidence which would have produced a different result at trial. Specifically, Boyles asserts that reviewing the transcripts would have caused a reasonable attorney to review Renee's school records, which disclose that she did not attend West High School until March 2, 1993. From this he argues that Renee could not have known him in December 1992 because it was not until she lived with her father and attended West that she had a relationship with Boyles.

To succeed on an ineffective assistance of counsel claim, 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). Whether counsel's performance was deficient and whether it prejudiced the defense are questions of law we review de novo. ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572, 575 (1989).

Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in the circumstances. ***State v. Pitsch***, 124 Wis.2d 628, 636-37, 369 N.W.2d 711, 716 (1985). To prove deficient performance, a defendant must establish that his or her counsel "made errors so

[2] For purposes of our analysis, we approach the issue as if trial counsel did not review the transcripts. The trial court refused to infer from the record that counsel reviewed the transcripts only on the day of trial. Despite repeated attempts, trial counsel could not be procured for the ***Machner*** hearing to admit or deny the inference that he failed to read the transcripts before trial. ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). Without explicitly overruling the trial court, we accept the inference because it does not alter our analysis.

serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990) (citing ***Strickland***, 466 U.S. at 687). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id***. at 127, 449 N.W.2d at 847-48.

To satisfy the prejudice prong, the defendant must show that "counsel's errors were serious enough to render the resulting conviction unreliable." ***State v. Smith***, 198 Wis.2d 820, 827, 543 N.W.2d 836, 838 (Ct. App. 1995), *overruled on other grounds,* 207 Wis.2d 258, 558 N.W.2d 379 (1997). There must be 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.'" ***Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848 (quoting ***Strickland***, 466 U.S. at 694).

We first conclude that trial counsel's performance was not deficient. Reviewing the transcripts of the Iddings trial could have better prepared him to cross examine the State's witnesses and perhaps alert him to further investigation that might be undertaken. Nonetheless, the essential issues in contention were the credibility and reliability of the witnesses and whether the assaults occurred during the period charged. Boyles's counsel thoroughly tried these issues, albeit with perhaps less evidence than was potentially available. The defendant was "'not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation.'" ***State v. Rock***, 92 Wis.2d 554, 560, 285 N.W.2d 739, 742 (1979) (quoting ***State v. Harper***, 57 Wis.2d 543, 557, 205 N.W.2d 1, 9 (1973)). Boyles has not overcome the

presumption that the manner in which his trial counsel addressed the primary issues, resulting in ten verdicts of acquittal, did not meet this standard.

Similarly, Boyles was not prejudiced by his trial counsel's failure to review the Iddings transcripts prior to trial. At Boyles's trial, several witnesses provided conflicting testimony as to when Renee and Boyles met. We do not know what testimony the jury relied upon in convicting Boyles and whether it accepted any part of Renee's testimony or discounted it altogether. Our review of the record demonstrates that Boyles's trial attorney thoroughly impeached both the reliability and veracity of Renee's testimony, and in particular the various timelines she offered. We see nothing in trial counsel's failure to present cumulative alternative evidence of a fact at issue that undermines our confidence in the jury verdict.

Finally, Boyles argues that he should be granted a new trial in the interest of justice because evidence discovered postconviction, that Renee did not begin using cocaine until after she started attending West, she did not meet Boyles until she started using cocaine, and she enrolled at West on March 2, 1993, demonstrates that the real controversy was not fully tried. We disagree. We may not grant a new trial on those grounds unless we can "determin[e] to a substantial degree of probability that a different result [is] likely to be produced on retrial." ***State v. Wyss***, 124 Wis.2d 681, 741, 370 N.W.2d 745, 773 (1985), *overruled on other grounds,* 153 Wis.2d 493, 451 N.W.2d 752 (1990). The issue of the timing of Renee and Boyles's relationship was thoroughly tried. Again, trial counsel thoroughly impeached Renee's credibility and veracity. We cannot determine to a substantial degree of probability that a new trial would produce a different result.

In sum, we conclude that the State did not withhold ***Brady*** information because the psychological report was not within its exclusive control and the information was available to the defense from other sources. We further conclude that trial counsel was not ineffective and that Boyles is not entitled to a new trial in the interests of justice.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.