COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2183-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE A. SUTTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

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

PER CURIAM. Lee A. Sutton appeals from a judgment convicting him of first-degree sexual assault of a child and from an order denying his postconviction motion for a new trial. We affirm.

Sutton first challenges testimony that he was on probation. Prior to voir dire, the court inquired whether Sutton had any prior convictions. *See* § 906.09, STATS. The State replied that Sutton had a 1990 conviction for misdemeanor theft. The court then advised Sutton that if he was asked if he had ever been convicted of a crime, he was to respond "Yes." If Sutton was asked, "How many times?," he was to respond "One." Sutton was warned that "[i]f you ask [sic] the question in any other manner, the people will be able to go into the nature of the offense." Sutton affirmed that he understood.

On direct examination, Sutton's counsel asked him if he had ever been convicted of a crime. Sutton responded that he had been. The following exchange then occurred:

COUNSEL:	How many times?
SUTTON:	When I was younger.
COUNSEL:	How many times, once?
SUTTON:	About three or four times when I was a kid.
COUNSEL:	If I said you have been convicted once, would that sound correct to you?
THE COURT:	Counsel, he's answered the question at this point.
COUNSEL:	All right.…

On cross-examination by the prosecutor, Sutton testified that he was forty-eight years old.

PROSECUTOR:	Your last conviction was six years ago, right, in 1990?
SUTTON:	Yes, uh-huh.
PROSECUTOR:	And you were still on --- you are still on probation for that, correct?
SUTTON:	Yes.

PROSECUTOR: So it wasn't just when you were a kid?
SUTTON: Well, may be, no, I guess not.

Sutton's trial counsel did not object to these questions or the answers or move for a mistrial. At the postconviction motion hearing, trial counsel testified that he believed that Sutton's failure to answer as the trial court had instructed opened the door on cross-examination to raise that Sutton was on probation for a crime which did not occur when he was "a kid." The prosecutor agreed and suggested that Sutton sought to mislead the jury into thinking that his prior conviction occurred when he was young. The prosecutor argued that the fact that Sutton was still on probation for the 1990 conviction indicated that Sutton could not have forgotten about this most recent conviction.

The trial court noted that it had carefully instructed Sutton how to answer regarding prior convictions, and Sutton did not comply. The court ruled that the prosecutor's questions, including whether Sutton was on probation, were appropriate because Sutton opened the door by answering inappropriately.

On appeal, Sutton argues that the probation evidence deprived him of due process because it was extremely prejudicial and suggested to the jury an independent ground for convicting him (i.e., bad character).

"The witness may be asked if he or she has ever been convicted of a crime and, if so, how many times. If the witness's answers are truthful and accurate, then no further inquiry may be made." ***State v. Sohn,*** 193 Wis.2d 346, 353, 535 N.W.2d 1, 3 (Ct. App. 1995) (citation omitted). Sutton did not answer on direct examination as instructed and apparently attempted to mislead the jury into believing that he did not have any recent convictions. Therefore, the inquiry regarding convictions did not end with direct examination and the State was

permitted to impeach Sutton. *Cf.* ***id.*** Furthermore, the manner of the impeachment tested Sutton's credibility and was therefore relevant. *See* ***Rogers v. State,*** 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980). When the question of prior convictions is placed before the jury, the jury is entitled to have accurate information regarding the existence and number of prior convictions. *See* ***Underwood v. Strasser,*** 48 Wis.2d 568, 572, 180 N.W.2d 631, 633 (1970).

Unlike ***State v. Ingram***, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996), here the evidence of Sutton's current status as a probationer was not offered to show a motive for or otherwise explain his alleged criminal conduct. *See* ***id.*** at 183, 554 N.W.2d at 836. Rather, it was offered to impeach Sutton's testimony that his prior conviction occurred when he was a youth.

Sutton argues that the probation evidence was plain error or the result of ineffective assistance of trial counsel. Because we conclude that the admission of this testimony was not error, counsel was not ineffective when he failed to object. *See* ***State v. Cummings***, 199 Wis.2d 721, 747 n.10, 546 N.W.2d 406, 416 (1996) ("attorney's failure to pursue a meritless motion does not constitute deficient performance").

Sutton also challenges evidence that he was residing in the Racine County Jail. On direct examination, Sutton's counsel asked, "Where do you live?" Sutton responded, "I stay at 1822 Mead Street with my sister." On cross-examination, Sutton testified that he was living with his sister at the time of the alleged crime. The prosecutor then asked Sutton, "You do not live with her now, correct?" Sutton responded, "No, I'm in the County Jail." Trial counsel did not object or seek a mistrial.

At the postconviction motion hearing, Sutton testified that he did not recall why he volunteered that he was living at the county jail. The prosecutor stated that she knew Sutton's response that he was living with his sister was false and she merely wanted to establish that he was not living at that address on the date of the trial. The trial court did not discern any error.

On appeal, Sutton contends that the prosecutor's question "You do not live with her now?" was designed to imply to the jury that Sutton was in custody, even if he had merely answered "no" to the question without elaborating. We disagree. The prosecutor's question was not designed to elicit a response that Sutton was in jail at the time of trial; it was tailored to require a "yes" or "no" answer. Sutton created the problem with his answer and cannot seek a remedy for the problem he created. *See* ***State v. Gove***, 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989).

Because we reject Sutton's claims of error regarding admission of evidence that he is a probationer residing in the county jail, we necessarily reject his claims of prosecutorial misconduct relating to this evidence.

Sutton next claims that trial counsel was ineffective for failing to offer a sexual dysfunction defense. Sutton claims that he informed trial counsel prior to trial that he could not have sex and had been treated for sexual dysfunction.[1] Sutton wanted counsel to question Sutton's girlfriend at the time of the alleged assault about the lack of a sexual relationship between them. Sutton

[1] The State's witness testified that she encountered Sutton when he had his penis in the child's mouth.

also wanted to argue that he was unable to orally assault the child in this case because he was unable to gain an erection. Counsel did not present this defense.

At the postconviction motion hearing, counsel testified that he reviewed Sutton's sex-related treatment records. The charged assault occurred in November 1995. Sutton's girlfriend testified that she saw Sutton ejaculate. Counsel acknowledged that no semen was found at the scene or on the victim and that Sutton told him he was not having sex with his girlfriend. Counsel considered but rejected a sexual dysfunction defense because the medical reports did not state that Sutton was impotent or incapable of having sex. Also, the evidence was not clear that Sutton could not achieve an erection, and a consulting urologist opined that there would be no way to verify whether Sutton could achieve an erection. Counsel was also concerned that by presenting evidence of sexual dysfunction, the jury would perceive Sutton as a "pedophile who was more interested in sexual relations with a child than with an adult."

Sutton testified about his dysfunction and that he asked counsel to present evidence that he was not having a sexual relationship with his girlfriend as a result. Had Sutton realized that counsel would not present the defense, he stated that he would have sought new counsel. In response, trial counsel testified that he and Sutton discussed the dysfunction defense, that Sutton knew he was not going to present that defense and that Sutton essentially agreed with that strategy. The trial court found that counsel was more credible than Sutton on the question of whether they discussed a sexual dysfunction defense.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient

performance, a defendant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***id.*** "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *See* ***id.*** at 127, 449 N.W.2d at 847-48.

"The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact." ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). The trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 542 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. *See* ***id.***

On the performance prong, 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.***

The trial court's finding that counsel discussed the possible defense with Sutton is not clearly erroneous on the postconviction hearing record. The

trial court was the sole arbiter of the credibility of the witnesses. *See* ***State v. Solberg,*** 203 Wis.2d 459, 467, 553 N.W.2d 842, 845 (Ct. App. 1996), *rev'd on other grounds*, 211 Wis.2d 372, 564 N.W.2d 775 (1997). Counsel's strategic decision was based upon medical records which did not conclusively establish Sutton's claim that he was incapable of having sex. We conclude that counsel made a reasonable strategic decision not to present this defense given its weakness and the possible inference that Sutton, unable to have a sexual relationship with an adult female, turned to children.

Finally, Sutton claims that the trial court relied on inaccurate information at sentencing. First, Sutton did not object to the trial court's consideration of the presentence investigation report (PSI) at sentencing or offer any corrections to it. While the court noted Sutton's criminal history in the PSI, the court was most concerned with the seriousness of the offense (forcible intercourse by placing his penis in the mouth of a three-year-old girl) and the fact that Sutton fled thereafter, evidencing guilt. The court sentenced Sutton to the maximum possible term—forty years.

At the postconviction motion hearing, counsel was not questioned regarding his approach to the PSI or his discussions with Sutton regarding the alleged errors in the PSI. Sutton testified that he and counsel reviewed the PSI prior to sentencing. Sutton testified regarding several inaccuracies in the PSI relating to his criminal record. In response to questioning by the court, Sutton testified that he did not recall whether the trial court asked at sentencing whether anyone had read the PSI and whether there were any inaccuracies. In fact, the trial court did so inquire. Counsel then testified that he reviewed the PSI with Sutton; the PSI bore counsel's notations of Sutton's comments. The court declined to grant Sutton any relief relating to his sentence.

Sutton has not argued on postconviction motion or appeal that trial counsel was ineffective for failing to bring the alleged inaccuracies to the trial court's attention.[2] We do not agree that the trial court's sentence was unduly influenced by the specifics of Sutton's criminal history. Rather, the trial court noted that Sutton had a general history of criminal conduct, which is true even if the allegedly inaccurate information is disregarded.[3] Even if offenses were listed in the PSI without indicating that they had been dismissed, the trial court was still entitled to consider them at sentencing. *See* ***State v. Mosley,*** 201 Wis.2d 36, 45, 547 N.W.2d 806, 810 (Ct. App. 1996).

By the Court.—Judgment and order affirmed.

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

[2] At the sentencing hearing, counsel stated that he would address corrections to the PSI in his argument. During argument, counsel briefly mentioned Sutton's prior record but emphasized that there was a longer period during which Sutton did not have contact with the criminal justice system and that any recent offenses were not violent.

[3] Sutton testified that an armed robbery actually was a robbery and some offenses were dismissed.