COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP185-CR **Cir. Ct. No. 2011CF1049**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY M. LAURIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Timothy Laurie appeals from a judgment, entered upon a jury's verdict, convicting him of second-degree sexual assault of a child and from an order denying his motion for postconviction relief. We reject his contention that trial counsel was ineffective and affirm.

¶2 Nineteen-year-old Laurie was charged with two counts of sexual assault of a child for allegedly having sexual intercourse with fourteen-year-old Kori M., the victim claimed that the first incident was mutually agreed to but that the second was against her will. Laurie denied that either occurred. The jury found Laurie guilty of one count and returned a hung verdict on the second, which was dismissed by the State at sentencing. Laurie sought postconviction relief on grounds of ineffective assistance of trial counsel. The trial court denied the motion after a ***Machner***[1] hearing. Laurie appeals.

¶3 A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if it is outside the wide range of professionally competent assistance, and not the result of reasonable professional judgment. ***Id.*** at 690. The performance prejudices the defense when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687.

¶4 This court's review of an ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will be upheld unless clearly erroneous. ***Id.*** The ultimate determination of whether the attorney's performance fell below the constitutional minimum is a question of law that we review independently. ***Id.***

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

¶5 Laurie first contends his trial counsel was ineffective for failing to object to the State's repeated elicitation of testimony that his adult girlfriend Brittany was pregnant with his child at the time of the claimed assaults. He contends the fact that he impregnated Brittany was irrelevant because it did not make it more or less probable that he had sexual intercourse with Kori. *See* WIS. STAT. § 904.01 (2011-12).

¶6 The State first asked Kori whether Laurie had told her that Brittany was pregnant by him. Trial counsel's objection on relevancy grounds was overruled. Counsel did not object when the State later queried Laurie and two other witnesses about Brittany being pregnant at the time of the alleged assaults. At the ***Machner*** hearing, counsel testified that she could not recall if she objected to the pregnancy questions. She agreed that such testimony was irrelevant, but testified that she did not believe it to be prejudicial, as Laurie's and Brittany's relationship was age-appropriate. The trial court assessed only prejudice and found the testimony was "neutral, neither harmful [n]or helpful."

¶7 We do not reach prejudice because we conclude counsel's performance was not deficient. She objected to the first pregnancy reference. With that objection overruled, it was reasonable to assume that subsequent objections to the same question would be futile. Trial counsel is not deficient for not making a meritless objection. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

¶8 Laurie also contends his trial counsel was ineffective for failing to move to either strike the State's unnecessary question and the resulting testimony

about a battery to Brittany[2] or request a cautionary instruction after the jury heard it. Again we disagree.

¶9 This exchange occurred when the State cross-examined Laurie's mother:

> Q. Miss Laurie, you were asked about who was living in your house at the time of the incident. How did you—but you weren't asked any specific dates. How did you know what incident?
>
> A. This is the only incident that's really been ever in my house.
>
> Q. Oh, aside from the battery with Brittany; correct?
>
> A. The battery with Brittany was not in my house.

The trial court sustained defense counsel's prompt objection.

¶10 Counsel testified at the ***Machner*** hearing that, having won the objection, she saw no need to draw more attention to the testimony by asking the court to strike it or to instruct the jury to disregard it. The trial court found this to be an appropriate strategy, given that the issue came up only once. It also found that three instructions it read to the jury, WIS JI—CRIMINAL 147 (Improper Questions), 148 (Objections of Counsel; Evidence Received), and 150 (Stricken Testimony), collectively "would lead a reasonable juror to know that the information was not to be considered."

[2] Laurie had been charged in an unrelated case with disorderly conduct (domestic abuse) and battery (domestic abuse) for conduct relating to Brittany. He pled no contest to the disorderly conduct and the battery was dismissed on the State's motion.

¶11 Laurie asserts that either a motion to strike or a cautionary instruction was imperative because, with the repeated testimony about his having impregnated Brittany, the battery testimony was not but a "single, fleeting utterance of inadmissible testimony." Further, the three instructions did not address the precise issue. We disapprove of the assistant district attorney's calculated tactics to sully Laurie with this question and the repeated pregnancy questions. Nonetheless, we stop short of concluding that trial counsel was *obligated* to make the requests he desired. A reasonable attorney *might* have done so but trial counsel had no clear duty.

¶12 In sum, the trial court's findings are not clearly erroneous. Counsel's strategies were ones a reasonably prudent lawyer might employ. Having concluded that counsel's performance was not defective, we need not address prejudice. *See* ***Strickland***, 466 U.S. at 697.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).