COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0518

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RUSSELL MARTIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Russell Martin appeals from an order denying his motions for postconviction relief. The issue on appeal is whether Martin was denied ineffective assistance of trial counsel. Because we conclude that Martin was not denied effective assistance of counsel, we affirm.

¶2 Martin was convicted after a jury trial of three counts of second-degree sexual assault. Martin, an Episcopal minister, was charged with committing the assaults against a boy who lived at the seminary Martin was attending at the time. The boy was the stepson of another seminarian. The charges were brought about six years after the events took place. At the time the charges were brought, Martin was working in a parish in Florida.

¶3 Martin appealed his conviction to this court and we affirmed. *See* ***State v. Martin***, No. 96-0564, unpublished slip op. (Wis. Ct. App. May 7, 1997). Martin was represented on that appeal by the same attorney who represented him at trial. Martin subsequently filed a motion for postconviction relief under WIS. STAT. § 974.06 (1997-98).[1] In this motion, Martin alleged five reasons why his trial counsel had been ineffective. He also filed a motion for sentence modification because the Department of Corrections had summarily denied his parole. A hearing was held on the motions and the circuit court denied them. Martin appeals.

¶4 Martin now asserts four reasons why his trial counsel was ineffective: (1) trial counsel failed to object to or seek exclusion of the testimony of Denise Watkins Galbreath; (2) trial counsel failed to object to or seek exclusion of the testimony of Officer Charles Mornachek; (3) trial counsel failed to seek a mistrial because of the prosecutor's improper statements during closing argument; and (4) trial counsel failed to request a new trial on the grounds of newly discovered evidence.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel claim on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶6 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***Strickland***, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶7 There is a strong presumption that counsel rendered adequate assistance. *See* ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. To meet the prejudice test, the defendant must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶8 Martin first claims that his trial counsel was ineffective for failing to object to the testimony of Denise Watkins Galbreath. Galbreath was a member of

the parish in Florida where Martin worked. Galbreath and Martin worked together on a project to set out that church's policy on accusations of sexual misconduct. Galbreath testified that in committee meetings Martin had expressed his opinion that they should make sure the people making accusations of sexual abuse against ministers were telling the truth before the police were called in. Galbreath, who had previously been a prosecutor who handled child sexual abuse type issues, was surprised at Martin's position because it was contrary to accepted practice and the law of Florida. She further testified that he presented his position in an inappropriately aggressive manner. Martin's trial counsel objected to Galbreath's testimony on the grounds of hearsay and lack of foundation.

¶9 Martin asserts that his trial counsel was ineffective for failing to object to or seek to keep out this testimony on the grounds of relevancy and undue prejudice. He asserts that the testimony was highly inflammatory and had no possible relevance to the allegations against him. He further asserts that his belief that a person should not be wrongly accused does not establish that he is guilty of the crime.

¶10 The circuit court, although questioning why the witness had been called by the State, found that trial counsel had been prepared for the witness and had conducted a "stellar cross examination" of the witness which, with other evidence presented, contradicted what the witness had to say. The court concluded that counsel had not been ineffective for failing to object on the grounds of relevancy and undue prejudice. We agree.

¶11 The testimony offered by this witness is subject to more than one inference. Martin argues that the testimony showed that he was simply asserting his concern that someone not be unfairly accused. Another reasonable inference

from this testimony, however, is that he was conscious of his guilt and seeking to protect himself. Consciousness of guilt is a relevant consideration. In short, this was a question for the jury to decide. Because it was properly a question for the jury, counsel was not ineffective for failing to object to it. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments).

¶12 The second reason Martin claims his trial counsel was ineffective was because counsel failed to object on relevancy grounds to the testimony of Officer Charles Mornachek. Mornachek testified that he went to Florida to interview Martin and that Martin met with him with his attorney present. Mornachek testified that Martin's attorney had told him that the interview would be limited to biographical questions with no questions about the allegations. Mornachek further testified that Martin did not answer any questions about the allegations at that point.[2]

¶13 The State responds in its brief that Martin has not established prejudice because Mornachek testified that Martin appeared at ease and cooperated during the interview. We fail to see how testimony about Martin's demeanor during the interview defuses any potential prejudice to him. Martin is arguing that the evidence showed only that he had invoked his constitutional right to have his attorney present and to remain silent, and therefore was irrelevant. We agree, however, with the State's ultimate conclusion that Martin was not prejudiced by the evidence, albeit for a different reason.

[2] Mornachek also testified that Martin had discussed the events with him in a previous phone conversation and had denied that he committed the crimes.

¶14 The jury was fully aware that Martin had a lawyer. The jury also had to be aware that Martin was advised at some point of the charges against him. The jury also must have been aware that Martin denied the charges because the State did not offer any evidence of a confession and because Martin testified that he did not commit the crimes charged. Further, Mornachek's testimony was very brief, a small part of a long trial, and was not emphasized during the trial. We do not see any prejudice, therefore, in the testimony that Martin had an attorney present when he was interviewed by an officer and refused to answer questions about the event.

¶15 The third basis for Martin's claim of ineffective assistance of counsel is that his counsel did not object or move for a mistrial based on certain remarks the prosecutor made during the closing argument. In his defense, Martin presented many character witnesses. In her closing argument, the prosecutor stated:

> Sexual abusers come in all shapes and sizes. Like I said, you can't pick them out and sometimes people don't know the other side of a person. I mean, even Jeffrey Dahmer had character witnesses, you know. They talked to a lot of people about his case and there were a lot of people that said I don't know, pretty quiet guy, seems to be a nice guy. You know, people living in the apartment building with him where he's boiling heads, they thought he was okay. Theodore Oswald had character witnesses. He executed a police officer. It's not hard to come up with people that like you and will say something nice about you, and I believe that anybody here could come up with five, ten fifteen, twenty people and march them in here and say you are a nice person and I am sure all of you are. My point is that anybody could go out and get twenty people to come in and say he's nice and they believe that, and for the most part I don't think any of those people were lying when they came up on the stand and they told you what their impressions of Mr. Martin were. They are perfectly understandable, but unfortunately we live in a society where nice people commit bad crimes.

¶16 Martin argues that the prosecutor's references to Dahmer and Oswald in this statement were improper. We agree and we admonish the prosecutor for making these statements. Her point could have been made without reference to these two people. We do not agree, however, that Martin's counsel was ineffective for failing to move for a mistrial based on these arguments.[3] We conclude that Martin was not prejudiced by these statements because taken in the context in which they were made, a reasonable jury would interpret this argument as one that any defendant—even one who is a bad person—will have character witnesses.

¶17 The final basis for Martin's claim that his counsel was ineffective is counsel's failure to move for a new trial based on newly discovered evidence. Martin argues that the victim's request at sentencing for $300,000 in restitution is newly discovered evidence and his counsel should have moved for a new trial based on this evidence. Martin asserts that this evidence was material to the outcome because it showed the victim's motives to accuse Martin and because the victim's attempt to conceal this evidence at trial affected the victim's credibility.

¶18 The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See*

[3] We accept, as does Martin, that counsel did not object to this testimony at the time because it would draw attention to the improper statements.

State v. Coogan, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

¶19 We are not convinced that it is reasonably probable that a different result would be reached at a new trial based on this new evidence. First, as to motive, the jury was already aware that the victim had a financial interest in the outcome of the trial. The testimony at trial established that the victim did not intend to bring a civil suit against Martin. The testimony further established that the victim was suing the seminary and various officials in the Episcopal Church because of the abuse the victim had suffered. The victim therefore had admitted, at least implicitly, to having a financial interest in the case. The new evidence about the amount of restitution the victim asked for would only have been cumulative.

¶20 Second, as to credibility, Martin has not established that the new evidence would affect the victim's credibility. The victim answered truthfully the questions about his intentions to bring a civil suit against Martin. There is no evidence that the victim understood that the questions about bringing a civil lawsuit encompassed his intention to request restitution in the criminal case. Even if the victim was aware that he was entitled to restitution if Martin were convicted, this does not show that the victim answered untruthfully the questions put to him about the civil actions. Martin has not established that there is a reasonable probability that there would have been a different result at a new trial. Because the argument lacks merit, counsel was not ineffective for failing to raise it. *See* ***Toliver***, 187 Wis. 2d at 360.

¶21 Martin also asserts that the cumulative effect of all of these errors constituted ineffective assistance of counsel. We have concluded that counsel did not err in two instances and that Martin was not prejudiced, without addressing error, in the two others. We will not consider the cumulative effect of errors or prejudice that did not occur.

¶22 For all these reasons, we conclude that Martin has not established that his trial counsel was ineffective. We affirm the order of the circuit court.

By the Court.—Order affirmed.

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