COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP268-CR **Cir. Ct. No. 2009CF789**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. RICKABY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael J. Rickaby appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erred in denying his motion to withdraw his no contest plea.

He also contends that the court erroneously exercised its discretion at sentencing. We reject Rickaby's claims and affirm the judgment and order.

¶2 On December 18, 2009, M.G., a fifteen-year-old girl, was walking through an alley on her way to school. A car traveling the wrong way down the alley passed her and stopped. A man got out of the car with one hand inside his jacket. M.G. eventually understood the man to say, "I have a gun. Get in the car." While backing away slowly, M.G. saw the man turn in a way that showed that he did not actually have a gun. She then ran into the school and reported the incident.

¶3 Three days later, police arrested Rickaby after an officer identified his car as the one seen in a surveillance videotape of the area. Police interrogated him, and he confessed to accosting M.G. When asked about his intentions, Rickaby said that he was going to force M.G. to take off her clothes and have sexual contact with him. The State subsequently charged Rickaby with attempted kidnapping, attempted second-degree sexual assault of a child, and attempted child enticement.

¶4 Eventually, Rickaby entered into a plea agreement and pled no contest to the charge of attempted kidnapping. In exchange, the State agreed to dismiss and read in the other charges and cap its sentencing recommendation at ten years of initial confinement followed by seven and one-half years of extended supervision. The circuit court followed the State's recommendation at sentencing.

¶5 After sentencing, Rickaby filed a postconviction motion seeking to withdraw his plea based on claims that he received ineffective assistance of counsel and that the State failed to disclose material evidence. In the alternative, he asked the court to reduce his term of initial confinement due to an alleged

erroneous exercise of discretion. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

¶6 On appeal, Rickaby first contends that the circuit court erred in denying his motion to withdraw his plea. A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

¶7 One way to establish a manifest injustice is to demonstrate that the defendant received ineffective assistance of counsel. ***State v. Dillard***, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44. This requires the defendant to show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. ***Id.***, ¶85.

¶8 A manifest injustice also occurs if the State withholds material evidence from the defense. *See* ***State v. Harris***, 2004 WI 64, ¶39, 272 Wis. 2d 80, 680 N.W.2d 737. The State has both a constitutional and statutory obligation to disclose material evidence to the defendant. *See* ***Brady v. Maryland***, 373 U.S. 83 (1963); WIS. STAT. § 971.23(1) (2013-14).[1]

¶9 Whether the defendant received ineffective assistance of counsel and whether the State violated its constitutional obligation to disclose material evidence are questions of constitutional fact. *See* ***Dillard***, 358 Wis. 2d 543, ¶86; ***Harris***, 272 Wis. 2d 80, ¶11. When reviewing questions of constitutional fact, we accept the circuit court's findings of historical fact unless clearly erroneous, but

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

independently apply constitutional principles to those facts. *See* ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. Whether the State violated its statutory obligation to disclose material evidence and whether the defendant suffered prejudice as a result are questions of law that we also review independently. *See* ***State v. Harris***, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397.

¶10 We begin with Rickaby's claim of ineffective assistance of counsel. Rickaby asserts that his trial counsel was ineffective in three ways: (1) for failing to attempt to suppress his confession, (2) for failing to investigate the issue of voluntary desistance, and (3) for failing to inform him that the State did not have sufficient evidence to prove either attempted second-degree sexual assault of a child or attempted child enticement. We consider each argument in turn.

¶11 Rickaby first complains that his trial counsel was ineffective for failing to attempt to suppress his confession. Rickaby submits that such an attempt could have been made due to his significantly impaired cognitive functioning. In support of this argument, Rickaby cites his educational history (he had taken special education classes) and poor health (he was severely diabetic and had suffered a stroke only months before). He also cites his demonstrated confusion during the interrogation where he gave incorrect answers to basic questions and appeared to fabricate stories about prior sexual assault victims.[2]

[2] Rickaby told police that he was twenty-nine years old, when in fact he was fifty-two years old. Likewise, he told them he had a son, which his wife denied. Also, he admitted to sexually assaulting a dozen girls in the previous month, which police could not verify.

¶12 At the postconviction motion hearing, trial counsel testified that she considered a motion to suppress, discussed it with Rickaby, and ultimately decided against filing it as a matter of strategy. Counsel believed there would be some benefit to having the prosecutor and potential jury know the full contents of Rickaby's confession, as it showed him to be in a confused state and cast doubt on his mental capacity to commit the charged crimes.[3] Counsel intended to use that as leverage in her plea negotiations. Counsel also noted that, had she later changed her mind about the strategy, she could have filed a motion to suppress at any time before the jury trial.

¶13 Given trial counsel's testimony, we cannot say that she was ineffective for failing to attempt to suppress Rickaby's confession. Counsel had a strategic reason for doing what she did. *See* ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984) (matters of reasonably sound strategy are "virtually unchallengeable" and do not constitute ineffective assistance). Moreover, she retained the ability to file a suppression motion at a later time if she changed her mind. In the end, counsel did not need to revisit her decision because Rickaby entered into a favorable plea agreement where the State dismissed and read in the charges that stemmed from the confession: attempted second-degree sexual assault of a child and attempted child enticement.

¶14 Rickaby next complains that his trial counsel was ineffective for failing to investigate the issue of voluntary desistance. Citing a statement made by

[3] Trial counsel was sufficiently concerned about Rickaby's mental health to request a competency examination and psychological evaluation regarding a potential plea of not guilty by reason of mental disease or defect (NGI). Ultimately, Rickaby was found competent to proceed, and the psychological evaluation concluded that he did not meet the requirements of an NGI plea.

M.G. to police, Rickaby maintains that he turned away from her before she ran away and, therefore, voluntarily desisted from the commission of the crimes.

¶15 When asked about the issue of voluntary desistance at the postconviction motion hearing, trial counsel was dubious that such a defense was available to Rickaby. She remarked, "I did not see that he voluntarily desisted. That was not my observation." We agree with counsel.

¶16 "The crime of attempt is complete when the intent to commit the underlying crime is coupled with sufficient acts to demonstrate the improbability of free will desistance." ***State v. Robins***, 2002 WI 65, ¶37, 253 Wis. 2d 298, 646 N.W.2d 287. "If the individual, acting with the requisite intent, commits sufficient acts to constitute an attempt, voluntary abandonment of the crime after that point is not a defense." ***State v. Stewart***, 143 Wis. 2d 28, 31, 420 N.W.2d 44 (1988).

¶17 Here, Rickaby's stated intention was to force M.G. to take off her clothes and have sexual contact with him. He confronted her in an alley, threatened her with a gun, and told her to get into his car. Under these facts, the charged crimes of attempt were already complete. Thus, even if Rickaby had subsequently turned away from M.G. and doubted his actions for a split-second before she ran away, the defense of voluntary desistance was no longer available to him. *See* ***id.*** Accordingly, trial counsel was not ineffective for failing to investigate this issue.

¶18 Rickaby's last complaint against trial counsel is that she was ineffective for failing to inform him that the State did not have sufficient evidence to prove either attempted second-degree sexual assault of a child or attempted child enticement. He notes that his actions towards M.G. lacked a sexual component.

¶19 Again, Rickaby's argument misses the mark. While Rickaby's actions towards M.G. may have lacked a sexual component, the State had ample evidence to prove his sexual intent. This included, of course, his confession to police indicating what he intended to do to M.G. It also included (1) his previous conviction for sexual assault of a child;[4] (2) his unsolicited statement upon arrest that he was a pedophile; and (3) other incriminating items found in a search of his home, including weapons and a sexual device. For these reasons, we conclude that counsel was not ineffective for failing to inform Rickaby of this issue.

¶20 We turn next to Rickaby's claim that the State failed to disclose material evidence. This claim arises from the State's inadvertent failure to turn over a videotaped statement that M.G. gave to police on the day of the offense.[5] Rickaby believes this videotaped statement supports a defense of voluntary desistance, as it shows that he turned away from M.G. before she ran away.

¶21 We agree with Rickaby that M.G.'s videotaped statement should have been turned over to him earlier as part of the initial discovery. However, that does not mean that a manifest injustice occurred. As noted by the circuit court, the substance of the videotaped statement was available to the defense in several other forms. For example, Rickaby had access to a police statement in which M.G. said, "As soon as [Rickaby] turned around I bolted the opposite direction." He was also aware of M.G.'s preliminary hearing testimony where she said, "[Rickaby] kind of turned and I noticed he didn't have a gun, so I took off running…." M.G. gave a

[4] Such evidence may have been admissible to show Rickaby's plan or motive. *See* ***State v. Friedrich***, 135 Wis. 2d 1, 22-23, 398 N.W.2d 763 (1987).

[5] The State acknowledged its mistake and turned over the videotaped statement during the postconviction proceedings.

similar statement to Rickaby's investigator, saying, "When the man turned [I] saw the man's hand and the man did not have a gun. [I] took off running and ran into the school office…."

¶22 Given the relative consistencies in M.G.'s accounts and the availability of her other statements to Rickaby, we are not persuaded that the videotaped statement was material for ***Brady*** purposes. *See* ***State v. Rockette***, 2006 WI App 103, ¶40, 294 Wis. 2d 611, 718 N.W.2d 269 ("Evidence is material for ***Brady*** purposes only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). Likewise, we are not persuaded that Rickaby suffered prejudice as a result of the statement's initial nondisclosure. *See* ***Harris***, 307 Wis. 2d 555, ¶15 (if the State violates its statutory discovery obligation, the court must determine whether the defendant was prejudiced). Rickaby had other evidence to support a claim of voluntary desistance had he chosen to pursue it. Moreover, such a defense would have been unsuccessful for the reasons explained above.

¶23 Finally, Rickaby contends that the circuit court erroneously exercised its discretion at sentencing. Specifically, he complains that the court relied upon an improper factor when it considered his diabetic condition.

¶24 Review of a sentencing decision is limited to determining whether discretion was erroneously exercised. ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. Discretion is erroneously exercised when a court imposes its sentence in reliance upon clearly irrelevant or improper factors. ***Id.*** A defendant must show by clear and convincing evidence that the sentencing court actually relied on an improper factor. ***Id.***, ¶34.

¶25 It is true that the circuit court mentioned Rickaby's diabetic condition in its sentencing remarks. However, this was done in response to Rickaby's suggestion that his condition may have contributed to his criminal behavior. Although the court recognized how Rickaby's condition may have affected his health and well-being, it refused to allow it to be used as an excuse for his dangerous and predatory conduct. It then discussed the need to monitor Rickaby and assist him in managing his condition.

¶26 When read as a whole, the sentencing transcript does not support Rickaby's claim that the circuit court erroneously exercised its discretion. The court considered appropriate sentencing factors (i.e., the nature of the offense, Rickaby's character, and the need to protect the public) and referenced the diabetic condition in a limited way. Additionally, in its decision denying the postconviction motion, the court expressly disavowed any improper reliance on the condition. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (the circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion). For these reasons, we reject Rickaby's challenge to his sentence.

By the Court.—Judgment and order affirmed.

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