COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1453-CR **Cir. Ct. No. 2012CF713**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS C. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dane County: NICHOLAS MCNAMARA, Judge. *Affirmed.*

Before Kloppenburg, P.J., Blanchard and Sherman, JJ.

¶1 PER CURIAM. Marcus Robinson appeals a judgment convicting him, after a jury trial, of second-degree sexual assault of an unconscious victim, as well as an order denying his postconviction motion. On appeal, Robinson argues that his trial counsel rendered ineffective assistance of counsel and that the real

controversy was not fully tried. For the reasons set forth below, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Robinson was charged with second-degree sexual assault of an unconscious victim. It was undisputed at trial that sexual intercourse occurred between Robinson and C.C. Robinson had been staying at a friend's apartment. C.C.'s boyfriend at the time, J.K., lived in the same apartment complex as Robinson's friend. C.C., Robinson, and others were drinking at J.K.'s apartment on the evening of the alleged assault. The group left to go to a bar. C.C. felt sick from the alcohol she had consumed and returned to J.K.'s apartment to lie down in his room. What occurred next was disputed at trial. The State took the position that C.C. was unconscious after drinking and that she later awoke to Robinson sexually assaulting her. Robinson's defense was that C.C. was conscious and that the sexual intercourse was consensual.

¶3 The jury returned a guilty verdict. Robinson filed postconviction motions for a new trial, arguing that his trial counsel rendered ineffective assistance and that the real controversy was not fully tried. The circuit court denied the motions after a ***Machner*** hearing.[1] Robinson now appeals.

DISCUSSION

¶4 On appeal, Robinson asserts that he received ineffective assistance of trial counsel because his counsel failed to present certain evidence that he

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

argues was material to his defense. Robinson also argues that he is entitled to a new trial on the basis that the real controversy was not fully tried. We address each argument below.

I. Ineffective Assistance of Counsel

¶5 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, the defendant must show that the acts or omissions of counsel were unreasonably outside professional norms. ***Id.*** To prove prejudice, the defendant must show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id.*** We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.***

¶6 Robinson asserts that his trial counsel provided ineffective assistance when she failed to present impeachment evidence regarding statements made by C.C. to police, failed to sufficiently cross-examine C.C. regarding the physical mechanics of the assault, and failed to elicit testimony from the Sexual Assault Nurse Examiner ("SANE nurse") who examined C.C. about statements made about the assault. We will address each category of evidence in turn.

C.C.'s statements to police

¶7 Robinson asserts that his trial counsel was ineffective because she failed to present impeachment evidence in the form of statements made by C.C. to police officers who interviewed her, as summarized in the officers' written reports. According to a report by Detective Kenneth Folkers, C.C. said that Robinson "was

talking about his deceased wife" to C.C. and that he asked for a sip of C.C.'s drink on the evening of the incident. A report by Officer Jeffrey Wissink included a statement by C.C. that she did not know Robinson very well and "had been talking with him earlier in the night and just having normal conversation." Also in Wissink's report was a statement by C.C. that she remembered asking Robinson if he had ever been married before.

¶8 Robinson argues that these statements would have impeached C.C.'s credibility because C.C. testified at trial that she did not have any private conversations with Robinson. Robinson also asserts that C.C.'s statements in the report would have disproved the State's argument that C.C. did not really know Robinson and that there was no flirting or private conversation going on between them prior to the assault. We are not persuaded by Robinson's arguments. Even if we assume without deciding that trial counsel was deficient in failing to introduce the evidence of C.C.'s statements to the police officers, Robinson cannot demonstrate that he was prejudiced, in light of the other evidence presented at trial. C.C. acknowledged in her trial testimony that she had spoken with Robinson as part of a group, but denied having any personal, individual conversations with him. Three witnesses who socialized with C.C. and Robinson on the night of the assault also testified that C.C. and Robinson did not have any individual, private, or one-on-one conversations and that they were not flirting. None of C.C.'s statements in the police reports are inconsistent with this testimony. We conclude that Robinson has failed to meet his burden of showing that his conviction is unreliable because of his trial counsel's failure to introduce the statements. *See* ***Swinson***, 261 Wis. 2d 633, ¶58.

Physical mechanics of the assault

¶9 We turn next to Robinson's argument that his trial counsel rendered ineffective assistance by failing to impeach C.C.'s testimony regarding the physical mechanics of the sexual assault. C.C. testified that prior to the assault, she went to lie down in J.K.'s bedroom. J.K. had a mattress on the floor that he used as his bed. C.C. lay down on her stomach, with her face turned toward the doorway. According to C.C., Robinson positioned himself with his body behind her during the assault, with his stomach touching her back. Robinson argues that this positioning would have been improbable, due to his large stature. He asserts that, due to the small size of the mattress, he would not have fit between C.C. and the wall, and that his trial counsel should have developed testimony to that effect.

¶10 At the postconviction motion hearing, Robinson's trial counsel testified that, although she considered cross-examining C.C. about Robinson's size and positioning, she ultimately did not think it would be a successful strategy due to the fact that the mattress was small and extremely mobile, like a camping pad. She chose instead to focus on other physical facts that would have made the assault difficult, such as the fact that C.C. was wearing jean shorts that would have been difficult for Robinson to remove or shift enough for sexual intercourse without waking C.C. Trial counsel also testified that her theory of defense was that the sex was consensual and that C.C. was conscious at the time. In fact, Robinson admitted in his own trial testimony that, at one point during sex, C.C. turned onto her side and he "got behind her between her and the wall." He then testified that, due to his physical stature, he could not "accommodate that position" and they moved to another position.

¶11 In light of the facts in the record, we are satisfied that trial counsel's decision not to elicit testimony from C.C. about the alleged physical improbability of Robinson's positioning was a reasonable strategic choice and did not constitute deficient performance. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) ("[a] strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel"). Eliciting such testimony would not have helped Robinson's case and, possibly, could have harmed his defense by discrediting his own testimony that C.C. was coherent and that she and Robinson willingly had intercourse that involved multiple positions, including one position where he was situated between C.C. and the wall.

C.C.'s statements to the SANE nurse

¶12 Robinson argues that his trial counsel was ineffective for failing to sufficiently develop testimony regarding statements made by C.C. to Jill Fisher, the SANE nurse who examined C.C. at the hospital after the assault. Fisher testified, with the assistance of her notes from the examination, that C.C. told her she was lying in bed and woke up thinking she was having sex with her boyfriend, but then realized it was not her boyfriend but was Robinson instead. Robinson draws our attention to the fact that Fisher's notes don't mention anything about C.C. waking up during intercourse. Instead, the notes state only that C.C. said, "I was laying in bed and I thought I was having sex with my boyfriend." Robinson asserts that it could be inferred from Fisher's notes, as opposed to Fisher's testimony, that C.C. was conscious and having consensual sex with someone, but that she was mistaken, because of her intoxication, about who that person was.

¶13 Robinson also argues that his trial counsel was ineffective for failing to elicit more testimony from Fisher about the questions she asked C.C. in filling

out the SANE examination report. The report, which was admitted into evidence, includes a questionnaire section with over twenty questions. Each question lists "Yes," "No," "Attempted," and "Unsure" as possible answers. Fisher testified that C.C. answered either "Yes" or "No" to all of the questions. C.C. never answered "Unsure" or "Attempted." Robinson's trial counsel asked Fisher about C.C.'s answers to two of the questions in the report. Robinson argues that, because C.C. answered the questions with such certainty, it could be inferred that she had more consciousness during the assault than her testimony indicated. Robinson also challenges his trial counsel's failure to elicit testimony from Fisher about C.C.'s denial, as shown on the intake portion of the SANE examination report, that she had any memory loss or lapse of consciousness.

¶14 At the postconviction motion hearing, Robinson's trial counsel testified that she did not elicit further testimony on the issue of what C.C. told the SANE nurse because she did not want to elicit further references to C.C.'s unconsciousness. That is, trial counsel stated that she wanted to be "short and to the point" with Fisher and expressed concern that if she went into too much detail about what was in the SANE examination report, Fisher would have the opportunity to reiterate the fact that C.C. was "passed out." We are satisfied that this was a reasonable strategic decision and not deficient performance, given that the defense's theory of the case was that C.C. was conscious and consented to sexual intercourse. *See* ***Elm***, 201 Wis. 2d at 464-65. To focus in greater detail on what C.C. told Fisher may have served to highlight details harmful to Robinson's defense. For example, C.C.'s statement that she "woke up" to someone having intercourse with her easily could have led the jury to infer that, prior to that point of waking up, C.C. was not aware of what was going on or was unconscious when

the intercourse began. Such an inference would have run contrary to the articulated theory of defense.

II. Discretionary Reversal

¶15 Robinson asserts that he is entitled to a new trial pursuant to WIS. STAT. § 752.35 (2013-14) because, based on the arguments we discuss above, the jury did not hear important testimony that he argues would have been essential to his defense.[2] Under WIS. STAT. § 752.35, this court may, in its discretion, reverse a judgment by the circuit court "if it appears from the record that the real controversy has not been fully tried." In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Darcy N. K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (internal quotations and quoted source omitted). We exercise our discretionary reversal power sparingly and only in the most exceptional cases. ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469.

¶16 We are not persuaded that discretionary reversal is warranted in this case. For the reasons discussed in our analysis of Robinson's ineffective assistance of counsel arguments, Robinson fails to show that the jury was precluded from considering important testimony that bore on an important issue. Therefore, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Robinson a new trial.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

By the Court.—Judgment and order affirmed.

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