COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2005

Cornelia G. Clark
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. 2003AP2521 **Cir. Ct. No. 1998CF311**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PEDRO FIGUEROA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Pedro Figueroa appeals pro se from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion for postconviction relief. He challenges the performance of his trial and appellate attorneys and claims he is the victim of prosecutorial misconduct. We reject his claims and affirm the order denying postconviction relief.

¶2 In 1998 Figueroa was convicted of repeated acts of sexual assault of the same child and causing a child to view or listen to sexual activity. Figueroa's victim was eleven-year-old V.R., the daughter of the woman with whom he was living. V.R. indicated that Figueroa sexually assaulted her over a period of four years beginning when she was seven years old. She also testified that Figueroa made her watch the pornographic video "Deep Inside Little Oral Annie."

¶3 Figueroa was also charged with sexual exploitation of a child for allegedly taking a nude picture of V.R. He was acquitted on that charge. On appeal the State conceded that Figueroa was improperly charged with sexual exploitation allegedly occurring during the same time period as the charge of repeated sexual assault of the same child. *See* WIS. STAT. § 948.025(3). Figueroa argued on appeal that he was entitled to a new trial because the evidence supporting the sexual exploitation charge was highly prejudicial. Figueroa's conviction was affirmed on appeal. ***State v. Figueroa***, 1999AP2842-CR, unpublished slip op. (WI App Nov. 29, 2000). This court concluded that admission of the nude photograph was harmless error because Figueroa was

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

acquitted of the sexual exploitation charge and the photograph was relevant to whether Figueroa sexually assaulted V.R. ***Id.***, ¶¶14-17.

¶4 Figueroa filed several pro se motions after the conclusion of his appeal. He sought postconviction discovery. On July 19, 2002, he filed a "partial motion for postconviction relief" under WIS. STAT. § 974.06, and asked that the motion be held in abeyance until he was provided with requested discovery materials. After addressing Figueroa's discovery requests, the circuit court required Figueroa to file his complete motion for postconviction relief or have the "partial motion" dismissed. On January 8, 2003, Figueroa filed a motion for postconviction relief asserting ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct. Two months after the State filed its response to the motion, Figueroa filed an "additional motion for a new trial" on the ground of jury bias because there were no Hispanic jurors. The circuit court denied Figueroa's postconviction motion by a written decision and without a ***Machner***[2] hearing. It also denied the motion challenging the racial composition of the jury array because Figueroa had not met his burden of establishing that the panel was not selected according to law or that a distinctive group of persons was systematically excluded from jury service.

¶5 Although mapped out in convoluted routes,[3] many of Figueroa's claims of ineffective trial counsel and prosecutorial misconduct lead to a single

[2] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] Figueroa's brief lacks discernible organization. It runs many of his claims together and repeats them. To the extent we do not address each nuance of his claims, we deem them to lack sufficient merit or importance to warrant individual attention. "An appellate court is not a performing bear, required to dance to each and every tune played on appeal." ***State v. Waste Management of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

destination—that evidence of the nude photo of V.R. should not have been admitted. We have already determined that admission of the nude photograph by reason of the improper exploitation charge was harmless error and that the photograph would have otherwise been admissible. ***Figueroa***, 1999AP2842-CR, unpublished slip op., ¶¶15, 17. "A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit and appellate courts." ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d 338. Thus, those claims that wind their way back to a claim of prejudice because of admission of the nude photograph lack merit. That includes claims that trial counsel was ineffective for not recognizing that Figueroa could not be charged with both sexual exploitation and repeated sexual assault during the same period, for not challenging the inclusion of the sexual exploitation charge in the information, and for not moving to exclude evidence of the photograph as other acts evidence. It also includes Figueroa's claim that appellate counsel failed to adequately discuss the prejudicial aspect of the nude photograph. It also includes claims that the prosecutor engaged in misconduct by not charging sexual exploitation in the original complaint, by delaying the charge until after the preliminary hearing even though the prosecution was in possession of the photograph, and by purposefully including the improper charge just to gain admission of the nude photograph. We need not specifically address those claims because Figueroa was not prejudiced by any conduct that resulted in admission of the nude photograph.

¶6 We turn to Figueroa's other claims of ineffective assistance of trial counsel.[4] The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The questions of whether counsel's actions were deficient and whether such actions prejudiced the defense are questions of law which we review de novo. ***State v. Hubanks***, 173 Wis. 2d 1, 25, 496 N.W.2d 96 (Ct. App. 1992). When reviewing a claim of ineffective assistance of counsel, the reviewing court may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶7 Figueroa claims that trial counsel failed to adequately investigate what occurred on the day Figueroa was arrested. Specifically, he contends that counsel failed to obtain police reports and tapes of the 911 calls made that day, failed to obtain statements from V.R., her mother, Ana, and V.R.'s sister, Corrine, and failed to interview potential witnesses who may have observed what went on when Figueroa was arrested. He relates his claims to his theory of defense that V.R. did not initially report that Figueroa sexually assaulted her and that Ana or V.R. fabricated the allegations after Figueroa called the police to report that Ana attempted to stab him when the two argued about whether Figueroa's son had

[4] We recognize that issues that could have been, but were not, raised in the first appeal may not be raised in a later motion under WIS. STAT. § 974.06, unless the party establishes "sufficient reason" for failing to raise the issues in the first appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Figueroa's allegation that appellate or postconviction counsel was ineffective for not raising a claim of ineffective trial counsel attempts to provide a sufficient reason and circumvent ***Escalona-Naranjo***. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). The circuit court did not specifically address whether a sufficient reason exists but looked to the merits of Figueroa's claims. We will do the same.

sexually assaulted V.R. Figueroa believes that Ana or V.R. fabricated the sexual assault allegations to detract from and justify Ana's criminal conduct in attempting to stab him. He believes that the 911 tapes would impeach the credibility of the prosecution's witnesses regarding who placed the calls, the timing of the calls, and who was initially accused of sexually assaulting V.R.[5] He faults trial counsel for not presenting pictures of the cuts he received to his hand when Ana came at him with the knife.

¶8 We first observe that Figueroa failed to demonstrate what additional investigation or statements from V.R., Ana, Corrine or other witnesses would have revealed. A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed. ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

¶9 Figueroa's theory of defense was presented to the jury. Figueroa testified that Ana confronted him only with the allegation that his son sexually assaulted V.R. and that Ana actually inflicted cuts on his hand during the knife attack. Ana's testimony was contrary since she indicated that she confronted Figueroa about sexually assaulting V.R. and that she did not get close enough to Figueroa to do any harm with the steak knife she threatened him with. While Figueroa is dissatisfied that additional evidence supporting his theory of defense was not presented, there is no indication that further helpful evidence existed. In fact, the police report confirms that the 911 call regarding the alleged sexual assaults was made just prior to the 911 call regarding the alleged stabbing. The report further indicates that Figueroa told police that prior to the attempted

[5] Figueroa's motion for postconviction discovery of the 911 tapes was denied.

stabbing, Ana confronted him with allegations that he had sexually assaulted V.R. That confrontation occurred before Figueroa exited the residence and called police. The report also indicates that Figueroa's daughter attempted to speak with Ana before the police arrived and the daughter was aware that Ana was accusing Figueroa of sexually assaulting V.R. Trial counsel was not ineffective for not investigating factual circumstances that, in light of the police report, simply did not appear to exist.

¶10 Figueroa claims that trial counsel should have investigated V.R.'s sexual history and requested a psychological examination of V.R. The suggestion that V.R. was not a virgin at the time of the assaults is totally without foundation and lacks any relevance to allegations against Figueroa since penetration was not alleged. What trial counsel would have done with information that V.R. had a sexual history is a mystery. Such evidence would not have been admissible under Wisconsin's rape shield law, WIS. STAT. § 972.11. Figueroa was not entitled to compel a psychological examination because the prosecution did not seek to present expert testimony that V.R.'s conduct was consistent with the conduct of other victims of child sexual assault, so-called ***Jensen***[6] evidence. *See* ***State v. Rizzo***, 2002 WI 20, ¶17, 250 Wis. 2d 407, 640 N.W.2d 93 (if ***Jensen*** evidence is not given the defendant is not entitled to a determination of whether a defense psychological examination should be granted). Trial counsel was not ineffective with respect to either point.

¶11 We next examine Figueroa's claims of prosecutorial misconduct but do so in the context of whether trial counsel was ineffective for not challenging

[6] ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988).

various actions by the prosecutor. He claims that the prosecutor knowingly presented the perjured testimony of V.R., Ana, and Corrine. While Figueroa may vigorously dispute the credibility of those witnesses and their version of the events, nothing suggests that their testimony was perjured. At best, Figueroa points out minor discrepancies in the testimony and police reports.

¶12 Figueroa claims that the prosecutor purposely chose not to charge him with causing a child to view sexual activity and sexual exploitation until after the preliminary hearing so that Figueroa could not defend himself. There was nothing improper in including those charges in the information timely filed after the preliminary hearing. Figueroa asserts that new charges were brought on the first day of trial, October 6, 1998. He also claims that the prosecution engaged in procedural ambush by not revealing the basis for the charge of causing a child to view sexual activity and the charge of sexual exploitation until the second day of trial.

¶13 Figueroa is wrong to assert that new charges were brought on the first day of trial. An amended information was filed on the first day of trial to make the charge of causing a child to view sexual activity more specific. The amendment narrowed the time frame to a two-month period in 1998[7] and specified the name of the pornographic video that V.R. viewed. The amendment was in response to Figueroa's claim that the charges were vague. At a hearing held on August 26, 1998, the name of the video was mentioned and the prosecutor indicated he would include that reference in the charging document. Before the

[7] The amended information also narrowed the time frame for a charge of intimidation of a victim but that charge was eventually dismissed.

amended information was accepted, defense counsel indicated that an agreement was reached regarding the charging period for the charge of causing a child to view sexual activity. Thus, the record establishes that new charges were not issued and there was no surprise by the filing of the amended information. The defense knew the basis of the charges.[8]

¶14 Figueroa claims that the prosecution's production of the video "Deep Inside Little Oral Annie" was a surprise, that it was obtained after the discovery deadline, and that the prosecutor lied about when he received the video.[9] Again Figueroa misstates the facts. The video which the prosecution offered at trial was not the same one that V.R. had viewed but was a copy obtained from a retail source. The prosecutor indicated that he had been provided the video just a few days before trial. As we have already pointed out, the defense was aware of the name of the video that V.R. viewed well in advance of the trial and in advance of the discovery deadline. Defense counsel had been unable to locate a copy of the video even though he called every adult video store in the area. There was no surprise element to the production of the video. Furthermore, Figueroa was not prejudiced by the production of the commercial version of the video or the cover box because those items formed the basis for a stipulation that the video named by V.R. depicted sexually explicit conduct. The prosecutor stated his intention to play the video for the jury or, if a stipulation was reached, to limit the presentation of evidence to a description of the tape and marking the cover box into evidence. In the absence of the stipulation, the prosecution could have shown the jury the

[8] The defense had access to the nude photograph as of July 10, 1998.

[9] The prosecution produced the video and cover box at trial. The jury did not view the video but the cover box was published to the jury.

video or maybe the unmarked video found in Figueroa's home. It was more advantageous to stipulate under the terms proposed by the prosecutor, which included publishing the cover box to the jury, than to have the jury view the sexually explicit material. The prosecution's production of the video was not misconduct and trial counsel was not ineffective for not challenging the way the video and cover box were put into evidence.

¶15 Figueroa also claims that the prosecution perpetrated a fraud to deny him his right to a speedy trial. This refers back to his contention that the prosecution purposely withheld the video and nude photograph and lied to the court about when those items came into the prosecution's possession. We have already explained that the facts are not as Figueroa states them to be. There was no withholding of evidence. Additionally, the delay in bringing Figueroa to trial was not presumptively prejudicial.[10] *See* ***Doggett v. United States***, 505 U.S. 647, 651 n.1 (1992) (delays are presumptively prejudicial as they approach one year).

¶16 Figueroa argues that he was denied an impartial jury because there were no Hispanic persons on the jury.[11] There was no claim on direct appeal that the jury selection was unconstitutional or otherwise improper. Accordingly, it is waived. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Figueroa offered no reason in his circuit court motion why the issue

[10] Figueroa made a speedy trial demand on June 2, 1998. The trial was once adjourned so the defense could conduct more investigation and once in response to additional discovery materials provided by the prosecution. Trial commenced on October 6, 1998.

[11] In his reply brief Figueroa expands this argument. He contends that he was denied a fair trial because without a bilingual person on the jury, there was no one on the jury to determine whether the Spanish interpreter properly interpreted every word. We do not consider arguments raised for the first time in a reply brief. *See* ***State v. Chu***, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878.

was not raised on direct appeal. For the first time in his appellant's brief he contends that trial counsel was ineffective for not raising the issue at trial. However, as the circuit court concluded, Figueroa failed to demonstrate that the issue had sufficient merit that trial counsel would be required to raise it. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."). Figueroa offered nothing to demonstrate that Hispanic people were systematically excluded from the jury panel and that there was any basis for trial counsel to raise that issue.

¶17 In summary, Figueroa has not demonstrated that his claims of prosecutorial misconduct or ineffective assistance of trial counsel have any basis. Thus, postconviction counsel was not ineffective for not pursuing those claims. The circuit court properly denied the WIS. STAT. § 974.06 motion without a hearing because the motion only contained conclusory allegations and no material facts that, if true, would entitle Figueroa to relief. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

By the Court.—Order affirmed.

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