COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2017

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. 2016AP277-CR **Cir. Ct. No. 2011CF473**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY A. SALENIUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Roy A. Salenius was convicted of one count of repeated sexual abuse of a child and sentenced to ten years of initial confinement

and ten years of extended supervision. *See* WIS. STAT. § 948.025(1)(e) (2015-16).[1] The circuit court denied Salenius's postconviction motion challenging the effectiveness of trial counsel. On appeal, Salenius again challenges counsel's effectiveness and also argues the circuit court improperly limited introduction of evidence of the victim's mental health. Because none of Salenius's arguments are persuasive, we affirm.

BACKGROUND

¶2 In the summer of 2011, Salenius was hired by C.M. to do remodeling work at C.M.'s Wisconsin Dells house. Salenius lived at the house during the job. The victim, O.S., is C.M.'s daughter, and she was fifteen years old at the time of the assaults. O.S. testified that in late August, Salenius started asking her "more personal questions" and "getting more sexual towards" her. One day when O.S. was folding laundry, Salenius kissed her. Another time, Salenius kissed O.S. while touching her breasts and "butt." Then, on August 31, Salenius was with O.S. in the "pink" bedroom and had sexual intercourse with O.S. O.S. did not tell anyone about the incident "right away" because she was "scared and ashamed." O.S. testified that the next day Salenius had sexual intercourse with her again, in a recliner.

¶3 When asked if she "[e]ventually" told anyone about these incidents, O.S. testified that she told her counselor, Dr. Foskett. O.S. first told Foskett that she had kissed an "older man." Then, shortly after the September 1 incident, O.S.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. The pertinent statutory language is unchanged from the statutes in effect at the time of the crime and trial.

told Foskett that she had "done a lot more." Foskett told O.S. that Foskett had to report the incident because O.S. was underage.

¶4 As part of their investigation, police submitted a blanket from the pink bedroom and the underwear O.S. was wearing on August 31 to the State Crime Laboratory for analysis. O.S. testified that after the assault, she put her underwear behind a chair "[b]ecause [she] did not want to see them again or have to wear them again." The day after police had collected other evidence from the house, O.S. gave the underwear to her mother who in turn gave them to the police.

¶5 The crime lab analyst testified that DNA from Salenius was found on the exterior of the underwear. The analyst also found amylase, an indicator of saliva, on the underwear. Semen stains were found on the blanket, and Salenius was identified as the source of the semen.

¶6 Further facts will be stated below as necessary to address Salenius's arguments.

DISCUSSION

A. Effectiveness of Trial Counsel

¶7 Salenius claims that his trial counsel was ineffective in three respects: (1) not objecting to the prosecutor's closing argument; (2) stating in his closing argument that "[w]e have to take [O.S.] at her word as to what happened with the underwear because there's nobody else who knows"; and (3) not filing a motion for discovery under ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) *modified by* ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, as to records of O.S.'s hospitalization in a Green Bay hospital after a suicide attempt in 2010.

¶8 We first set forth the controlling legal principles.

¶9 To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** A defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88; ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The objective standard of reasonableness encompasses a wide range of professionally competent assistance. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). We presume that counsel's performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See* ***id.***

¶10 To prove constitutional prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***Strickland***, 466 U.S. at 694).

¶11 With these standards in mind, we address Salenius's claims.

1. Failure to Object to Prosecutor's Closing Argument

¶12 In the State's rebuttal closing argument, the assistant district attorney stated:

> Back in 2011 when [O.S.] first initially reported this to Dr. Foskett, yes, she denied what had happened. But I can also tell you that that's not all that she said, because clearly if someone reports no sexual activity happened, a criminal case doesn't get filed.

¶13 On appeal, Salenius argues that the rebuttal argument was improper because it suggested there was additional inculpatory information that had not been presented to the jury. Salenius contends his trial counsel was ineffective because he did not object. At the postconviction hearing, Salenius's trial attorney testified that he did not object because he felt the prosecutor was "simply … stating the obvious, that a criminal case doesn't get filed unless someone reports some sort of sexual activity." The circuit court rejected Salenius's claims, concluding that the statement was "well within the bounds of [the evidence] presented at trial."

¶14 We agree with trial counsel's assessment that the prosecutor was "stating the obvious." The jury knew that O.S. disclosed the assaults to Foskett in stages. The jury also knew that Foskett had an obligation to report the incident because O.S. was underage. And, obviously, the jury knew that criminal charges had been filed as a result of the incidents. If counsel had objected, the circuit court would have overruled the objection. Counsel cannot be faulted for not making a meritless objection. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

2. Trial Counsel's Statement Regarding the Underwear

¶15 During closing argument, Salenius's trial attorney criticized the chain of custody with regard to O.S.'s underwear. Counsel stated:

> We have a pair of underwear that's been unaccounted for for twelve days. That pair of underwear that [O.S.] says she never wanted to see again, she didn't throw it away. It's just laying on the living room floor behind a chair. It's—that's not consistent with not wanting to see something again. You're going to see it again if it's on the living room—in the living room on the floor.
>
> And during that—well, during the twelve days, suppose again we have—we have to take [O.S.] at her word as to what happened with the underwear because there's nobody else who knows.

¶16 On appeal, Salenius criticizes those comments and argues that trial counsel should have emphasized O.S.'s inconsistent statements about her underwear. At the postconviction hearing, trial counsel stated that his theory of defense was that the assaults never occurred and that Salenius's DNA was found on the underwear because it "had been laying around for twelve days" and the DNA was "deposited through a secondary source onto the underwear." The circuit court concluded that the counsel's defense strategy was reasonable and, therefore, not ineffective assistance of counsel. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992) ("Even if it appears in hindsight, that another defense would have been more effective, the strategic decision will be upheld as long as it is founded on rationality of fact and law.").

¶17 Trial counsel and the circuit court focused on the deficient performance prong of the ***Strickland*** test. We choose to address the prejudice prong. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11 (reviewing court may address either prong).

¶18 As noted above, ***Strickland's*** second prong requires the defendant to prove that his right to a fair trial was prejudiced. ***Strickland***, 466 U.S. at 687. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a probability sufficient to undermine our confidence in the outcome of the trial. ***Thiel***, 264 Wis. 2d 571, ¶20.

¶19 Whether counsel's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial. *See* ***State v. Wolff***, 171 Wis. 2d 161, 167-68, 491 N.W.2d 498 (Ct. App. 1992) (discussing prosecutorial argument). This trial was short—the evidentiary portion took only one afternoon and the following morning. The primary witnesses for the State were O.S., her mother, and the DNA analyst. In addition, a police officer established the chain of custody for the blanket and underwear, and a county social worker testified about a child protective service report created when the assaults were first reported.[2] To the extent that O.S. offered conflicting statements about her underwear, the trial was not so complicated or drawn out that a jury could not recall the evidence and draw the inferences it deemed appropriate. We cannot say that there is a reasonable probability that the result of the trial would have been different if trial counsel had made a different closing argument about O.S.'s underwear. Therefore, Salenius has not satisfied the prejudice prong of the ***Strickland*** test. *See* ***Thiel***, 264 Wis. 2d 571, ¶20.

[2] O.S.'s two sisters also briefly testified. Both girls testified that Salenius lived in their house while working there. Neither girl observed any inappropriate touching or behavior.

3. *O.S.'s Mental Health Records*

¶20 Salenius next complains that his trial attorney did not seek to obtain medical records from O.S.'s hospitalization in Green Bay. Before trial, counsel filed a ***Shiffra/Green*** motion aimed at three sets of records – notes from the Pauquette Center, notes from the Columbia County social services, and notes from the Shawano County social services. The circuit court reviewed the records *in camera* and ordered release of the Columbia County records. The records alluded to a period of hospitalization. Counsel did not make an additional motion seeking release of those records.

¶21 In ***Shiffra***, this court held that a defendant may obtain *in camera* inspection of a victim's privileged medical records by making a preliminary showing that the records are material to the defense. ***Shiffra***, 175 Wis. 2d at 608. In ***Green***, the supreme court clarified that the preliminary showing of materiality requires the defendant to "show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." ***Id.***, 253 Wis. 2d 356, ¶32 (citation omitted). The court further explained that "a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." ***Id.***, ¶33. The showing must be more than "mere speculation or conjecture as to what information is in the records." *See* ***id.***[3]

[3] In a decision that lacked a majority opinion, the supreme court recently did not overrule the ***Shiffra/Green*** test. *See* ***State v. Lynch***, 2016 WI 66, ¶¶73, 92, 371 Wis. 2d 1, 885 N.W.2d 89.

¶22 At the postconviction hearing, Salenius presented testimony of Erik Knudson, a forensic psychiatrist. Knudson testified that he had reviewed Dr. Foskett's treatment notes and those notes reveal that O.S. had been hospitalized and, in his experience, hospital records would contain a "more thorough" evaluation from "multiple perspectives" than that found in an outpatient therapist's records. Knudson went on to describe several conditions that appear to have been "rule[d] out" in Foskett's notes and others that were indicated as possible diagnoses of O.S.'s mental health.

¶23 In its oral ruling, the circuit court conceded that it likely would have reviewed the Green Bay records *in camera* if counsel had requested a review. The court, however, agreed with the State's characterization of Knudson's testimony as filled with "maybes" and "might[s]" and devoid of the required reasonable likelihood. The court ruled that it "ha[d] no reason to believe … that the Green Bay information would have been any different" from the other material that the court had examined *in camera* and refused to release it to Salenius.

¶24 On appeal, Salenius does not take issue with the circuit court's assessment that Knudson's testimony lacks the "reasonable likelihood" required by ***Green***. *See* ***Green***, 253 Wis. 2d 356, ¶34. Salenius merely states, in conclusory fashion, that the Green Bay records would have contained evidence bearing on O.S.'s credibility. Salenius relies solely on the fact that O.S. was hospitalized, and he speculates that the records of that hospitalization would "contain relevant information necessary to a determination of guilt or innocence [that is] not merely cumulative to other evidence available" to him. *See* ***Green***, 253 Wis. 2d 356, ¶34. ***Shiffra/Green***, however, requires more. Because Salenius has not shown that a ***Shiffra/Green*** motion directed to the Green Bay hospital records would have led to the release of those records, his claim of ineffective

assistance of counsel fails. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (counsel's failure to pursue a meritless motion does not constitute deficient performance).

B. Evidence of O.S.'s Mental Health

¶25 Salenius's next argument also concerns O.S.'s mental health. Before trial, the circuit court ruled that Salenius could not introduce evidence relating to O.S.'s mental health. The court made its ruling as part of its ***Shiffra/Green*** analysis. The court stated that it found nothing in the reviewed records that "go beyond or into the area of—of not being able to comprehend reality …. There's no instances at all of her making up any events."

¶26 "The admission of evidence rests within the discretion of the [circuit] court," and this court reviews only whether "the [circuit] court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record." ***State v. Roberson***, 157 Wis. 2d 447, 452, 459 N.W.2d 611 (Ct. App. 1990).

¶27 Salenius contends that his constitutional right to confront witnesses was violated. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. We review de novo whether a circuit court's decision to admit or exclude evidence violates a defendant's constitutional right to confront witnesses called by the State. ***State v. Yang***, 2006 WI App 48, ¶10, 290 Wis. 2d 235, 712 N.W.2d 400. The right to confront witnesses is "central to the truthfinding function of the criminal trial" but that right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." ***State v. McCall***, 202 Wis. 2d 29, 43, 549 N.W.2d 418 (1996) (citations omitted). A circuit court retains "'wide latitude … to impose reasonable limits on such cross-examination based on concerns about,

among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant.'" ***Id.*** at 44 (quoting ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985)). A defendant's confrontation right is not violated when the court precludes the introduction of irrelevant or immaterial evidence. ***McCall***, 202 Wis. 2d at 44.

¶28 Evidence is relevant if it has a tendency to make a fact of consequence to a case more or less probable. WIS. STAT. § 904.01. Inquiry into the mental health of a witness may be relevant to credibility "where it appears that a connection exists between the affliction and the reliability of the witness's testimony." ***Johnson v. State***, 75 Wis. 2d 344, 360-61, 249 N.W.2d 593 (1977). Evidence of a mental health condition may be relevant to witness credibility when the condition "in some way impair[s the] capacity to observe the event at the time of its occurrence, to communicate [the] observation accurately and truthfully at trial, or to maintain a clear recollection of it in the meantime." ***Chapin v. State***, 78 Wis. 2d 346, 355-56, 254 N.W.2d 286 (1977).

¶29 In this case, Salenius offered no proof that O.S.'s mental health issues affected her ability to observe and communicate experiences. On appeal, Salenius points to Dr. Foskett's notes which indicate that O.S. reported hallucinations.[4] That reference predates the incidents by nearly one year and also indicates that medication has decreased the frequency. More to the point, "hallucinations" covers a broad range of conditions and Salenius offers no

[4] Dr. Foskett's notes are the Pauquette Center records that the circuit court refused to release to trial counsel. Despite that pretrial order, it is evident from the trial that Salenius was at least generally aware of O.S.'s treatment with Foskett. It is clear that the entirety of Foskett's notes were in possession of Salenius's postconviction counsel.

connection between O.S.'s condition and her ability to accurately perceive sexual contact or testify truthfully about it. The circuit court had the benefit of having reviewed all of O.S.'s mental health treatment records before ruling that there was no evidence that O.S.'s "capacity to observe" or "communicate … accurately or truthfully" was impaired. *See* ***id.*** at 355-56. The standard set forth in ***Johnson*** and ***Chapin*** was not met. *See also* ***State v. Richard A.P.***, 223 Wis. 2d 777, 789-90, 589 N.W.2d 674 (Ct. App. 1998) (diagnosis of depression and multiple personality disorder not admissible given no evidence that witness's ability to recall events was affected). Therefore, the circuit court did not err when it limited Salenius's inquiry into O.S.'s mental health.

By the Court.—Judgment and order affirmed.

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