COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP771-CR **Cir. Ct. No. 2015CF5534**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN MCCLAINE TERRELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. John Terrell was sentenced after pleading guilty to one count of third-degree sexual assault for sexual intercourse without consent and one count of exposing genitals. Terrell filed a postconviction motion, seeking either resentencing because at the sentencing hearing the parties and the sentencing court used his suppressed involuntary statements to police in violation of his due process rights, or a ***Machner***[1] hearing because Terrell's trial counsel was ineffective for failing to object to the use of the suppressed involuntary statements at the sentencing hearing. The postconviction court denied the motion without a hearing.[2] Terrell renews his postconviction arguments on appeal. We take Terrell to concede the State's argument that Terrell forfeited his right to directly challenge the use of the suppressed involuntary statements because Terrell does not refute that argument in his reply brief, and we conclude that Terrell was not denied effective assistance of counsel because Terrell fails to show that he was prejudiced by his trial counsel's performance. Accordingly, we affirm.

BACKGROUND

¶2 The State initially charged Terrell with one count of second-degree sexual assault of a child under the age of sixteen based on statements that the victim, SDT, made to police, as well as statements that Terrell made to police during an interrogation. According to the criminal complaint, Terrell admitted during the police interrogation "to having penis to vagina sexual intercourse with SDT."

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

[2] The Honorable Ellen R. Brostrom presided over Terrell's motion to suppress, plea hearing, and sentencing hearing. The Honorable Jeffrey A. Wagner decided Terrell's postconviction motion.

¶3 Terrell filed a motion to suppress his statements made to police relating to his admission of sexual intercourse with SDT on the ground that they were involuntary.[3] In response, the State conceded that Terrell's statements were involuntary and the circuit court granted Terrell's motion to suppress.

¶4 Subsequently, Terrell pled guilty to one count of third-degree sexual assault for sexual intercourse without consent and one count of exposing genitals. As part of the plea colloquy at the plea hearing, the circuit court asked Terrell to confirm that he had sexual intercourse with SDT, and whether the other facts in the criminal complaint were substantially true and correct. Terrell stated that he did have sexual intercourse with SDT, but that it was not "violent" or, as clarified by the court, with "any force." The circuit court accepted Terrell's pleas, and ordered a presentence investigation report (PSI).

¶5 In the PSI report, the PSI writer referenced statements made by Terrell to police during the interrogation that had been suppressed by the circuit court, specifically that Terrell stated to police that he had sexual intercourse with SDT. The PSI writer reported that when asked about those statements, "Mr. Terrell stated the offense did not occur."

¶6 At sentencing, the circuit court confirmed that the parties and counsel had reviewed the PSI. Terrell's trial counsel corrected a typographical error, but did not object to any other part of the PSI.

[3] For ease of reading, we will refer to these statements generally as the "suppressed statements."

¶7 During the sentencing hearing, both the prosecutor and Terrell's trial counsel referenced Terrell's suppressed statements about having intercourse with SDT, and we relate those references in greater detail in the discussion below. It is sufficient for background purposes to say that the prosecutor referenced the suppressed statements to draw negative character inferences based on what the prosecutor characterized as the difference between what Terrell told the PSI writer and what he told police. Terrell's trial counsel referenced the suppressed statements to highlight the consistency of Terrell's statements throughout the litigation that SDT had consented to sexual intercourse, despite "the denial" in the PSI.

¶8 The circuit court then asked Terrell, "[I]s that correct, that in fact this sex did happen, but you thought it was consensual?" Terrell answered, "Yes, ma'am."

¶9 The circuit court sentenced Terrell to the maximum penalty on each count. In sentencing Terrell, the court stated that "I know your version of it is that it was consensual. I don't buy that. I think there's some pretty compelling granular detail that [SDT] ... gives about the violence, about the coercion, and about the profound effect that's had on her, and, frankly, even if it was consensual, it's still illegal." After reviewing the victim impact statement, the court stated that "the gravity of this offense is compounded by the fact that [SDT] was impregnated" and "I think that a period of confinement as punishment and deterrence is much more appropriate in this case."

¶10 Terrell filed a postconviction motion requesting a resentencing hearing because his suppressed statements were improperly used at the sentencing hearing. In the alternative, Terrell asked for a ***Machner*** hearing to evaluate his

claim of ineffective assistance of counsel for his trial counsel's failure to object to the use of the suppressed statements at the sentencing hearing. The postconviction court denied Terrell's motion without a hearing.

DISCUSSION

¶11 It is undisputed that Terrell's trial counsel not only failed to object to the prosecutor's use of the suppressed statements, but that Terrell's trial counsel also referenced those statements during the sentencing hearing. In its response brief, the State argues that, as a result, "Terrell forfeited any right" to directly challenge the use of those suppressed statements. In his reply brief, Terrell does not refute the State's argument, and we deem Terrell to concede that the State's argument is correct. *See* ***United Coop. v. Frontier FS Coop***., 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). However, Terrell can, and does, raise an objection through a claim of ineffective assistance of trial counsel. *See* ***State v. Jones***, 2010 WI App 133, ¶25, 329 Wis. 2d 498, 791 N.W.2d 390 (an unobjected-to-error "should be addressed in an ineffective-assistance-of-counsel context"); ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244 (addressing unobjected-to-error at sentencing "in the context of an ineffective assistance of counsel claim"). Terrell argues that his "trial counsel was ineffective for failing to object to the use of [his] suppressed, involuntary statements at sentencing." As explained below, we reject Terrell's argument because he fails to show that he was prejudiced by his trial counsel's performance.

¶12 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was both (1) deficient and (2) that it

prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We may dispose of a claim of ineffective assistance of counsel on either ground, and if Terrell has failed to prove one ground, we need not address the other. ***Id.*** at 697. Whether Terrell was prejudiced by counsel's deficient performance depends upon whether Terrell can show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). In conducting that inquiry, we look to see whether counsel's errors were so serious as to deprive Terrell of a fair sentencing, the result of which is reliable. *See* ***id.*** at 127.

¶13 The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State v. Alexander***, 2015 WI 6, ¶15, 360 Wis. 2d 292, 858 N.W.2d 662. We "grant deference only to the circuit court's findings of historical fact." ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111 (quoted source omitted). The final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the circuit court. *See* ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992)

¶14 Terrell argues that "counsel's failure to object to the use of Mr. Terrell's involuntary statements throughout his sentencing hearing undermines confidence in the fundamental fairness of his sentence."[4] The State responds that

[4] Terrell also seems to suggest in a conclusory fashion that the error here was *per se* prejudicial because the unobjected-to use of his suppressed statements violated his constitutional right to due process. However, he does not develop this proposition or cite supporting legal authority. Accordingly, we do not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that arguments that are undeveloped and unsupported by references to legal authority "will not be considered").

no prejudice resulted because the content of the references to the suppressed statements made at the sentencing hearing merely reflected what Terrell "already said at the plea hearing," and therefore were already before the sentencing court. Based on our review of what was actually said at the plea hearing and at the sentencing hearing, as related in detail below, we agree with the State.

¶15 According to the criminal complaint, Terrell admitted during a police interrogation that he had sexual intercourse with SDT. Terrell's statements were then suppressed. At the plea hearing, Terrell admitted to the substance of the suppressed statements, as characterized in the complaint, as the factual basis for his plea, and stated that SDT had in fact consented to sexual intercourse and that it did not occur forcibly. The circuit court accepted Terrell's plea to the charge of sexual intercourse *without consent* because Terrell agreed that SDT "cannot consent by law" due to her age: her actual consent did not matter to the offense charged. The pertinent portion of the plea colloquy is as follows:

> THE COURT: How then do you plead to the charge of third-degree sexual assault?
>
> THE DEFENDANT: It's hard for me to say this, but I will say it, guilty.
>
> THE COURT: And to exposing genitals?
>
> THE DEFENDANT: Guilty.
>
> ….
>
> THE COURT: Are the facts in that Complaint substantially true and correct?
>
> MR. ANDERSON: Judge, he disputes -- the language that's stated in the Complaint that's attributed to him, he denies -- denies all of that.
>
> THE COURT: He denies making those statements? … Is there anything else in the Complaint that you think is untrue, sir?

THE DEFENDANT: I'm not that type of person.

THE COURT: Well, it's a simple question, sir. Is there something in the Complaint that you think is not true other than the statements that are attributed to you?

THE DEFENDANT: The violent part.

THE COURT: So you're saying you didn't use any force?

THE DEFENDANT: I'm not violent.

THE COURT: Is that -- just answer the question yes or no. Are you saying you did not use any force? Is that what you're communicating?

THE DEFENDANT: Yes, ma'am.

....

THE COURT: So the allegations that you had sexual intercourse with SDT without her consent and exposed your genitals to her for your sexual arousal and gratification, those things are true; is that correct? Leaving aside the force and your statements, those things are true, is that correct or is that not correct?

....

THE DEFENDANT: No.

THE COURT: Okay. So what are you pleading to, then, sir? I can't take your pleas without a factual basis for them. Did you have sexual intercourse with SDT?

THE DEFENDANT: Yes.

THE COURT: Okay. And SDT is a child, right?

THE DEFENDANT: Yes, ma'am.

THE COURT: That person cannot consent by law, correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: So you're guilty of Count 1, correct?

THE DEFENDANT: Yes, ma'am.

¶16 The PSI writer subsequently reported that, "When asked about the offense, Mr. Terrell stated the offense did not occur." At the sentencing hearing, the prosecutor, addressing Terrell's character, referred to this statement in the PSI report as Terrell's "outright denial of the incident," and stated, "That is contrary to what the Defendant told police when he was interviewed and that it was cooperative sex." Terrell's trial counsel responded:

> I was troubled as well about the denial in the presentence report.... I know what [Terrell] said to Detective Wells in his statement that it was a consensual act minus the language in the violence that [SDT] says occurred .... I believe [Terrell] is going to tell you that this did occur, as he told the detective, but it was consensual, a different version than [SDT] presents here.

¶17 At the conclusion of counsel's remarks, the circuit court asked Terrell, "[I]s that correct, that in fact this sex did happen, but you thought it was consensual?" Terrell answered, "Yes, ma'am." The court did not ask Terrell about the statement in the PSI report, and in imposing sentence the court did not reference that statement or any asserted inconsistency in Terrell's position. Rather, the court, in assessing Terrell's character, stated, "I know your version of it is that it was consensual." It is apparent from the court's remarks that it was acknowledging that Terrell had, from entering his pleas through making his remarks at sentencing, maintained that SDT had in fact consented to sexual intercourse. And, as shown above, the record bears that acknowledgement out.[5]

[5] Nor does the PSI statement necessarily refute the consistency of Terrell's position that SDT had in fact consented to sexual intercourse. He did not deny the "incident" as stated by the prosecutor; he denied the "offense." That denial would be consistent with his repeated denial that the offense, sexual intercourse without consent, occurred and his repeated position that SDT had in fact consented to sexual intercourse. However, as he acknowledged at the plea hearing, the sexual intercourse was without consent because a person of SDT's age could not consent as a matter of law.

¶18 The record does not indicate that the content of the suppressed statements differed in any material way from what Terrell told the circuit court at his plea hearing. Had the PSI report, the prosecutor, and Terrell's trial counsel not referred to Terrell's suppressed statements to the police, the circuit court would still have had before it Terrell's admission at the plea hearing that sexual intercourse with an underage victim did occur. Terrell cannot show prejudice from references to suppressed statements that did not materially differ from what Terrell himself told the court at the plea hearing as the factual basis for his plea.

¶19 Nor are we persuaded that Terrell was prejudiced when the circuit court confirmed with Terrell that his admission at the plea hearing was still "correct." The court made it clear that it considered Terrell's "version of it" as consensual in counterpoint to SDT's version, which provided "some pretty compelling granular detail ... about the violence, about the coercion, and about the profound effect that it's had on her." *See* ***State v. Salas Gayton***, 2016 WI 58, ¶23, 370 Wis. 2d 264, 882 N.W.2d 459 ("The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." (quoted source omitted)). In sum, Terrell cannot show how the result would have been different without any reference to his suppressed statements, because Terrell voluntarily told the court the substance of those statements during his plea hearing as the factual basis for his plea. Because Terrell has failed to allege facts that undermine our confidence in the fairness of his sentencing process, his ineffective assistance of counsel claim fails.

CONCLUSION

¶20 For the reasons stated, we affirm.

By the Court.—Judgment and order affirmed.

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