COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP813-CR **Cir. Ct. No. 2014CF2319**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL M. WILSON,

DEFENDANT-APPELLANT.

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

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRASH, J. Daniel M. Wilson appeals from a judgment of conviction, entered upon a jury's verdict, and the denial of his postconviction motion. He argues that there was insufficient evidence to support his conviction of repeated sexual assault of a child during the time period specified by the State.

He also claims that his trial counsel was ineffective for (1) failing to object to the admission of medical test results of the victim, on the grounds that it was a violation of his right to confrontation; and (2) for failing to object to testimony by the State's experts regarding the prevalence of familial relationships between sexual abuse victims and their abusers, on the grounds of unfair prejudice. We affirm.

BACKGROUND

¶2 Wilson was charged in June 2014 with the repeated sexual assault of F.T., who was eight years old at the time. Wilson is the boyfriend of F.T.'s mother, J.Y.; Wilson and J.Y. had previously been in a relationship, which they resumed in June 2013. Additionally, Wilson is the father of one of J.Y.'s younger children, A.W.[1]

¶3 At the time that Wilson and J.Y. resumed their relationship, J.Y. and her children were living with J.Y.'s mother at a house located on Buffum Street in Milwaukee. Wilson regularly stayed overnight at the Buffum Street home, but did not live there. In November 2013, Wilson, J.Y. and her children moved into a house together located on North 6th Street in Milwaukee.

¶4 The Bureau of Milwaukee Child Welfare (BMCW)[2] became involved with the family on May 5, 2014, due to suspicion of physical abuse,

[1] A.W., who was six years old at the time of the trial in January 2015, was born during the previous relationship between J.Y. and Wilson. Additionally, J.Y. was pregnant again with Wilson's child at the time of this trial.

[2] The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed The Division of Milwaukee Child Protective Services. Since the agency was still the BMCW at the time of these proceedings, all references will be to the BMCW.

based on a history of unexplained injuries to F.T. and her siblings.[3] A protective plan was put into place where the children were returned to the North 6th Street home, with J.Y.'s sister as the supervising adult. However, on May 13, 2014, BMCW discovered that J.Y.'s sister had failed to perform those supervisory duties. The family then moved in with Wilson's mother, Armer Lloyd, at her home on North 28th Street in Milwaukee, so that Lloyd could assume the role of supervising adult.

¶5 Shortly thereafter, F.T., who has some cognitive delays, was observed at school with a bruise on her arm. F.T. explained that J.Y. had hit her because F.T. had broken a plate; however, there were several injuries found on her arms indicating more than one contact, and the bruise on her arm was more consistent with blunt force trauma and being struck more than once. All of the children were then removed from the home on May 19, 2014.

¶6 The children were given full physical exams for evaluation of abuse or neglect, which is standard procedure for children being placed in foster care. During F.T.'s exam, it was discovered that she had painful lesions in her vaginal area which had spread to her anal area. She began crying during the exam, exclaiming that "someone did this to me." Further testing revealed that F.T. had herpes type 1.

¶7 Since this diagnosis is indicative of sexual abuse, a forensic interview was then conducted. During that interview, as well as during her

[3] J.Y. had five children at the time of trial; F.T. is the oldest.

testimony at trial,[4] F.T. described many types of sexual contact and sexual intercourse that Wilson had engaged in, on multiple occasions, including penis-vagina, penis-anus, mouth-anus, and digital intercourse. F.T. also testified that Wilson had made her touch him, and that he had "peed" on her head, and "peed" in her mouth, describing it as "white stuff." F.T. described the various assaults as taking place at her granny's house (J.Y.'s mother); at "[A.W.]'s granny's house" (Wilson's mother, Lloyd); and at her house and her "momma['s] house," both of which presumably refer to the house on North 6th Street.

¶8 Wilson was charged with repeated sexual assault of a child, pursuant to WIS. STAT. § 948.025(1)(b) (2015-16).[5] As required by that statute, the State specified a time frame for the assaults: January 1, 2013, through May 5, 2014.

¶9 This matter went to trial in January 2015. The State introduced evidence that Wilson had tested positive for herpes type 1. The State also called as an expert witness the doctor who examined F.T., Dr. Judy Guinn. During Dr. Guinn's testimony, the State introduced into evidence F.T.'s medical records from the medical examinations performed after she was detained by BMCW. Those medical records showed that F.T. had been diagnosed with herpes type 1.[6] Furthermore, Dr. Guinn testified that she had personally examined F.T. and had observed the lesions. She therefore concluded, based on the diagnosis together

[4] F.T. referred to Wilson as "Trey" in her testimony; it is undisputed that she was referring to the defendant.

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[6] The parties stipulated that Wilson tested positive for both herpes type 1 and type 2, but the actual test results show that Wilson tested positive only for type 1. However, this error is immaterial to the issues discussed in this appeal.

with F.T.'s statement that "someone did this to me," that F.T. had been sexually abused.

¶10 Additionally, Dr. Guinn testified that in her twenty-two years of experience, the "vast majority of cases of sexual abuse are by persons who are either relatives or acquaintances" of the victim. She also noted that child victims are often threatened by their abusers and told "not to cry or not to tell."

¶11 Also testifying on behalf of the State was Amanda Didier, the forensic examiner who interviewed F.T. Didier testified that "interfamilial sexual abuse," which is "sexual abuse perpetrated on a child by a member of their family," is the most common type of sexual abuse. She further stated that sexual abuse by the boyfriend of the victim's mother would be considered "interfamilial" in this context.

¶12 Wilson also testified at trial. He denied abusing F.T., instead claiming that she had contracted herpes from sharing towels or silverware.

¶13 The jury convicted Wilson. He was sentenced to fifty years, bifurcated as thirty-seven years of initial confinement and thirteen years of extended supervision.

¶14 Wilson timely filed a postconviction motion seeking to vacate his conviction. He argued that the State had failed to prove that the assaults took place within the time frame it had specified—between January 1, 2013 and May 5, 2014—based on F.T.'s testimony that many of the assaults had taken place at Lloyd's home; the family had not moved there until May 13, 2014, outside of the specified time frame.

¶15 Wilson also alleged ineffective assistance of trial counsel. His first claim was that counsel failed to object to the admission of the medical records; specifically, that the test results indicating F.T. had herpes are testimonial in nature and that trial counsel should have objected on the grounds that it violated his right to confrontation. He further argued that counsel should have objected to the expert testimony of Dr. Guinn and Didier with regard to the prevalence of child sexual assaults being committed by family members, and that abusers often threaten their victims. Wilson claimed that the testimony was irrelevant and prejudicial.

¶16 The trial court denied Wilson's motion. With regard to the time frame of the assaults as specified by the State, the trial court found that in child sexual assault cases the date of the assault is not a "*material* element" of the offense. The trial court further found that even if some of the assaults occurred outside of the time frame specified by the State, there was still sufficient evidence to support Wilson's conviction.

¶17 The trial court also rejected Wilson's ineffective assistance of counsel claims. It adopted the State's argument in its response brief with regard to confrontation on the medical records: that the medical records were not testimonial, and that Dr. Guinn had examined F.T. herself. The trial court further found that the expert testimony regarding the relationship between child victims and abusers was appropriate "in the context of what was discussed."

¶18 This appeal follows.

DISCUSSION

¶19 Wilson presents the same issues on appeal that he brought in his postconviction motion.

I. Sufficiency of the Evidence

¶20 Wilson was convicted of the repeated sexual assault of the same child, pursuant to WIS. STAT. § 948.025(1)(b). To be convicted under this statute, it must be proven that the defendant committed three or more acts of first-degree sexual assault involving the same child within a specified time frame. ***Id.***; *see also* WIS. STAT. § 948.02(1)(am),(b), and (c). In this case, the time frame specified by the State was January 1, 2013, through May 5, 2014.

¶21 Wilson first argues that the evidence provided at trial was not sufficient to prove that the assaults occurred during that specified time frame. Specifically, he contends that F.T.'s testimony indicates that almost all of the assaults took place at "[A.W.]'s granny's house," and that the family did not move to that location until May 13, 2014—after the specified time frame.

¶22 In general, the issue of the sufficiency of the evidence is a question of law that we review *de novo*. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. In making our determination, "we consider the evidence in the light most favorable to the State and reverse the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***Id.*** (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Accordingly, we will "uphold the conviction if there is any reasonable hypothesis that supports it." ***Smith***, 342 Wis. 2d 710, ¶24.

¶23 As stated above, in order to convict Wilson under WIS. STAT. § 948.025(1)(b), the jury had to find that he engaged in at least three sexual assaults against F.T. between January 1, 2013, through May 5, 2014. *See* WIS JI—CRIMINAL 2107. However, exact dates upon which the assaults occurred are not required. ***State v. Hurley***, 2015 WI 35, ¶10 n.6, 361 Wis. 2d 529, 861 N.W.2d 174. This is due to the nature of the crime. As this court discussed in ***State v. Fawcett***:

> Sexual abuse and sexual assaults of children are difficult crimes to detect and prosecute. Often there are no witnesses except the victim. The child may have been assaulted by a trusted relative or friend and not know who to turn to for assistance and consolation. The child may have been threatened and told not to tell anyone. Even absent a threat, the child might harbor a natural reluctance to reveal information regarding the assault. These circumstances many times serve to deter a child from coming forth immediately. As a result, exactness as to the events fades in memory.

Id., 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988) (citation omitted).

¶24 Therefore, because "[c]hild molestation often encompasses a period of time and a pattern of conduct" and thus "a singular event or date is not likely to stand out in the child's mind," prosecution of this type of crime can be difficult. ***Id.*** at 249, 254. These difficulties formed the basis for enacting WIS. STAT. § 948.025:

> WISCONSIN STAT. § 948.025 was enacted to address the problem that often arises in cases where a child is the victim of a pattern of sexual abuse and assault but is unable to provide the specifics of an individual event of sexual assault. The purpose of the legislation was to facilitate prosecution of offenders under such conditions.

State v. Nommensen, 2007 WI App 224, ¶15, 305 Wis. 2d 695, 741 N.W.2d 481 (footnote omitted). Therefore, our supreme court found that it is "the *course* of

sexually assaultive conduct that constitutes the primary element of this offense." ***State v. Johnson***, 2001 WI 52, ¶16, 243 Wis. 2d 365, 627 N.W.2d 455.[7]

¶25 In this case, while F.T. indicated that many of the assaults occurred at A.W.'s granny's house, she also testified that she was assaulted at the homes where the family had lived during the specified time frame: J.Y.'s mother's house and the North 6th Street house. Furthermore, it must be taken into account that this was the testimony of a young child with cognitive difficulties, who was only eight years old when she endured these traumatic experiences. "The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution." ***Fawcett***, 145 Wis. 2d at 254.

¶26 Here, the jury heard graphic details of many different types of sexual assaults that F.T. endured at different times and places. It was entirely reasonable for the jury to conclude that at least three of those assaults occurred during the time frame specified by the State. *See* ***Smith***, 342 Wis. 2d 710, ¶24. We therefore uphold Wilson's conviction.[8]

[7] We note that in its decision denying Wilson's postconviction motion, the trial court cited ***State v. Kempainen*** in support of its finding that in child sexual assault cases the date of the assault is not a "material element" of the offense. ***Id.***, 2015 WI 32, ¶22, 361 Wis. 2d 450, 862 N.W.2d 587. However, the primary issue in ***Kempainen*** was the fact that the victim had not come forward for over ten years after the assaults had occurred. ***Id.***, ¶6. Because this factual scenario is not on point with the issues here, we do not rely on it for our analysis.

[8] The State argues that Wilson forfeited his claim on this issue because he failed to raise the issue at trial that the evidence presented did not comport with the time frame specified by the State. We note that the State could have amended the information to conform to the testimony, but chose not to. In any event, since we have found that there was sufficient evidence to support Wilson's conviction, we do not reach this issue.

II. Ineffective Assistance of Counsel

¶27 Wilson next argues that he received ineffective assistance of counsel. He specifically points to (1) counsel's failure to object to the admission of F.T.'s medical records on grounds that it violated Wilson's right to confrontation; and (2) counsel's failure to object to certain testimony by the State's experts.

¶28 To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "Wisconsin applies the two-part test described in ***Strickland*** … for evaluating claims of ineffective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111.

¶29 "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "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." ***Id.*** (citations and internal quotation marks omitted). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Strickland***, 466 U.S at 697.

A. Failure to Object Based on the Right to Confrontation

¶30 Wilson asserts that F.T.'s medical records, admitted into evidence during the trial, violated his right to confrontation, as set forth in ***Crawford v.***

Washington, 541 U.S. 36 (2004). The right of an accused to confront the witnesses against him or her, set forth in the Sixth Amendment of the United States Constitution and known as the Confrontation Clause, is "a fundamental right" that is guaranteed by the Wisconsin Constitution as well. ***State v. Griep***, 2015 WI 40, ¶18, 361 Wis. 2d 657, 863 N.W.2d 567; ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. "Although a [trial] court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919.

¶31 Specifically, Wilson argues that F.T.'s test results indicating she had herpes were testimonial because they were prepared for use in his criminal prosecution. *See* ***Crawford***, 541 U.S. at 52; *see also* ***Davis v. Washington***, 547 U.S. 813, 822 (2006) (where the court held that a statement is testimonial if its "primary purpose" is to "establish or prove past events potentially relevant to later criminal prosecution").

¶32 F.T.'s medical records are not testimonial. A social worker at BMCW testified that it is standard procedure for all children being placed in foster care to receive a complete medical evaluation by a doctor. When the lesions in F.T.'s vaginal and anal areas were discovered, they were tested for the purpose of determining proper treatment. Thus, F.T.'s medical records were prepared during the course of regularly conducted activity by BMCW, and not for the primary purpose of Wilson's criminal prosecution. *See* WIS. STAT. § 908.03(6). Additionally, as patient health care records, an authenticating witness was not required. *See* WIS. STAT. §908.03(6m).

¶33 Furthermore, Wilson was afforded the opportunity to confront a witness regarding F.T.'s medical records. They were introduced into evidence during the testimony of Dr. Guinn, one of the State's expert witnesses. During her testimony, Dr. Guinn referred to notes made by the sexual assault nurse examiner who had conducted the initial genital exam of F.T. During that exam, F.T. had cried out that "someone did this to me," and Dr. Guinn's conclusion that F.T. had been sexually assaulted was partially based on this statement. It is common practice for experts to rely on information other than their own personal knowledge in making determinations and drawing conclusions. *See* ***Williams***, 253 Wis. 2d 99, ¶29 ("It is rare indeed that an expert can give an opinion without relying to some extent upon information furnished by others."). Additionally, Dr. Guinn had also examined F.T. and made the initial diagnosis; she thus had personal knowledge of F.T.'s medical condition. Since Dr. Guinn was a testifying expert for the State, Wilson had the opportunity to confront and cross-examine her.

¶34 For these reasons, we find that Wilson's right of confrontation was not violated.

¶35 Accordingly, because it is "well-established that trial counsel could not have been ineffective for failing to make meritless arguments," Wilson's claim fails. *See* ***State v. Allen***, 2017 WI 7, ¶46, 373 Wis. 2d 98, 890 N.W.2d 245.

B. Failure to Object to Prejudicial Expert Testimony

¶36 Wilson next argues that his trial counsel was ineffective because she failed to object to expert testimony that he contends was irrelevant and prejudicial. Specifically, Wilson asserts that counsel should have objected to testimony by Dr. Guinn and the forensic examiner, Didier, regarding general information relating to

child sexual assault that they have garnered in their experiences in working with victims. Dr. Guinn testified that the vast majority of child sexual abusers are relatives or acquaintances of the victims, and that they often will threaten the victims to ensure their silence. Didier testified that in most cases of child sexual abuse there is an interfamilial connection, and that the boyfriend of a victim's mother would be considered interfamilial in that context.

¶37 "The criterion of relevancy is whether the evidence sought to be introduced would shed any light on the subject of inquiry." ***Rogers v. State***, 93 Wis. 2d 682, 688, 287 N.W.2d 774 (1980). The relationship between Wilson and F.T. was certainly relevant to the issues being addressed at trial; thus, trial counsel was not deficient for failing to object. *See* ***Allen***, 373 Wis. 2d 98, ¶46. Furthermore, Wilson concedes that there was no evidence introduced that Wilson had ever threatened F.T.[9] and, as such, Wilson fails to demonstrate how that particular statement was prejudicial to his case. *See* ***State v. Koller***, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838 ("Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense."). Accordingly, because Wilson has failed to satisfy either prong of the ***Strickland*** test, this claim fails as well. *See* ***id.***, 466 U.S at 687.

¶38 In sum, because we find that the evidence was sufficient to support Wilson's conviction, and that he has failed to demonstrate that he received ineffective assistance of counsel, we affirm the judgment of conviction and the trial court's denial of his postconviction motion.

[9] F.T. testified that Wilson had told her to be quiet at times during the assaults, and that he said he was "going to tell [her] momma on [her]," both of which could be construed as threats pursuant to Dr. Guinn's testimony. Nevertheless, Wilson conceded this point.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.