COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1932-CR **Cir. Ct. No. 2012CF1369**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE M. DANCEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: CHAD J. KERKMAN, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Jose M. Dancel appeals from a judgment of conviction entered after a jury found him guilty of two counts of first-degree

sexual assault of a child and two counts of incest, and from an order denying his motion for postconviction relief. Dancel maintains that he is entitled to a new trial based on trial counsel's ineffective assistance. Because we conclude that trial counsel did not perform deficiently, we affirm.

BACKGROUND

¶2 Dancel was charged with two counts of first-degree sexual assault of a child (sexual contact with a child under thirteen) and two counts of incest after his young daughter reported to officials at her elementary school that she was afraid to go home because Dancel had "raped" her the night before. During a forensic interview and at trial, the victim stated that while she was sleeping in bed with Dancel on one side and her younger brother on the other, Dancel fondled her breast and vagina and made her fondle his penis. Dancel was convicted of all counts and the court imposed a global bifurcated sentence totaling thirty years, with fifteen years each of initial confinement and extended supervision.

¶3 Dancel filed a postconviction motion alleging in pertinent part that trial counsel provided ineffective assistance by (1) failing to recognize and object to the evidence of Dancel's dysfunctional behavior[1] as inadmissible other acts evidence under WIS. STAT. § 904.04(2)(a) (2015-16)[2]; (2) failing to object to the victim's trial testimony because the prosecution inadvertently omitted her from

[1] In particular, Dancel complained about testimony concerning allegations of physical and emotional abuse directed toward the victim and her brother, Dancel's alleged drug and alcohol use, and Dancel's alleged behavior evincing impulsivity and poor parenting skills. In general, we refer to these purported acts as evidence of Dancel's dysfunctional behavior.

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

their witness list; and (3) failing to call Dancel's mother, Connie Delatorre, to rebut testimony concerning Dancel's dysfunctional behavior.

¶4 Following an evidentiary ***Machner***[3] hearing, the circuit court denied Dancel's postconviction motion, determining that trial counsel's alleged deficiencies amounted to reasonable strategic decisions that were consistent with the theory of defense. Dancel appeals.

DISCUSSION

¶5 Dancel maintains that he is entitled to a new trial due to trial counsel's ineffective assistance. To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which caused prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct" fell "below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30. A defendant must show specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Judicial review of an attorney's performance is "highly deferential" and the reasonableness of an attorney's acts must be viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583. To prove constitutional prejudice, the defendant must show that but for counsel's

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694; ***Love***, 284 Wis. 2d 111, ¶30.

¶6 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Strickland***, 466 U.S at 698. The circuit court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id.*** We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

Trial counsel's failure to object to evidence of Dancel's dysfunctional behavior did not constitute deficient performance.

¶7 Various prosecution witnesses testified to episodes of Dancel's dysfunctional behavior before the sexual assaults, including (1) physical and emotional anger directed toward the victim and her brother, (2) alleged drug and alcohol use, (3) impulsive behavior, and (4) poor parenting skills. In his postconviction motion, Dancel alleged that trial counsel provided ineffective assistance by failing to object to this evidence.

¶8 At the ***Machner*** hearing, trial counsel testified that he did not object to the testimony complained of because it supported the theory of defense, namely, that tension caused by Dancel's dysfunctional behavior motivated the victim to make false allegations of sexual assault and that her mother aided or encouraged the false allegations in order to obtain custody from Dancel. Trial counsel also explained that he did not object to some of the questions because they "made it

look like [the victim] was embellishing and exaggerating" Dancel's behavior. Additionally, counsel intended to call Dancel's mother, Connie Delatorre, to rebut statements attributed to her in an effort to attack the credibility of certain witnesses. Further, trial counsel intended to and did use this evidence strategically with his expert witness to point to potential indicators of the victim's untruthfulness as well as potential problems with the investigation and the interviewing techniques.

¶9 The circuit court found as a matter of historical fact that trial counsel's strategy "was that the child was either lying or she had a misperception of what was going on or she just wanted to be out of the home." The court explained: "Whether she wanted to be out of the home just because or whether she wanted to be out of the home because the home was a bad home, that was all part of the trial strategy." It found that trial counsel "preferred the jurors to believe that the defendant had a bad home over the defendant committing a crime or sexual assault to his daughter," and deemed this a "sound strategy," suggesting "perhaps it was the best strategy that he had with the information that he had."

¶10 We conclude that the circuit court properly determined that trial counsel's conduct was strategic rather than deficient. The circuit court is in a superior position to gauge the nature of the case, the credibility of the witnesses, and the alternatives available to trial counsel; its determination that trial counsel developed and executed a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620.

¶11 Further, the record supports the circuit court's findings and conclusions. By not objecting to evidence that Dancel behaved in ways that the

victim considered "strange" and "weird" and that prompted her mother to promise she "was going to fix things," trial counsel could reasonably contend that tension in Dancel's household motived the victim, whether on her own or at her mother's prompting, to falsely accuse her father of sexual assault.

¶12 Additionally, trial counsel strategically used this evidence with his expert witness, who explained that the victim's mother's requests for social service interventions were consistent with parental indoctrination—a purposeful attempt "to get the child to have certain beliefs …. It is consistent because the parent is giving the message rather clearly that something is wrong in Daddy's household." The expert concluded that the evidence of Dancel's dysfunctional behavior may have led the victim to "put herself into" a dispute between her parents "by making up a story of sexual assault."

¶13 Trial counsel continued these themes through his closing argument. In the end, the defense presented the jury with a motive for the victim to falsely accuse Dancel of sexual assault, and allowed an experienced forensic expert to explain why and how a child like the victim might make false allegations. "That counsel's trial strategy was unsuccessful does not mean his performance was legally insufficient." ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987).

Trial counsel's decision not to call Connie Delatorre as a defense witness does not constitute deficient performance.

¶14 Connie Delatorre, Dancel's mother, was expected to take the stand to rebut statements attributed to her by other witnesses concerning Dancel's dysfunctional behavior. She was prepared to testify that she did not make disparaging comments about Dancel to the victim or the victim's mother. Though

trial counsel met with Delatorre multiple times to discuss her prospective testimony, he did not call her as a witness. Dancel challenges this decision as ineffective, asserting that Delatorre was "the only witness who could contradict some of the character-degrading testimony that [trial counsel] allowed the jury to hear."

¶15 At the ***Machner*** hearing, trial counsel testified that he did not call Delatorre as a witness because on the day the State rested its case-in-chief, Delatorre told him she did not want to testify and that her testimony "would hurt the case." Dancel told trial counsel he did not want "to force his mother to testify and that he agreed with her assessment that her testimony would be more damaging to his case than helpful." Trial counsel concluded that "the risks of calling this witness outweigh any benefit you're going to get, which was confirmed" by Dancel's approach, meaning: "He didn't want to call her. He said it was going to hurt as well."

¶16 The circuit court found trial counsel's testimony credible and determined that his decision not to call a witness who said her testimony would hurt his client's case was reasonable and sound. We agree. Constitutionally effective representation does not "require an attorney to browbeat a reluctant witness into testifying." ***Knowles v. Mirzayance***, 556 U.S. 111, 125 (2009). Counsel is certainly not constitutionally required to run the risk of harming his client's case by putting on a witness who threatens to hurt, rather than help, his case. We also observe that Delatorre's testimony was only part of the defense strategy in relation to the evidence of his dysfunctional behavior. Trial counsel still made use of that evidence through his expert and to argue motive. Further, Dancel's girlfriend's testimony was offered to contradict that of the victim.

Trial counsel did not perform deficiently by not asking the circuit court to exclude the victim's testimony.

¶17 In addressing housekeeping matters just before trial, the State informed the court it had inadvertently left the victim off its witness list and had filed a corrected list several days earlier. Trial counsel stated that a prospective defense witness, Connie Delatorre, did not appear on the defendant's witness list. The State objected to allowing Delatorre's testimony. Trial counsel said "that if I'm not objecting to his major witness, who wasn't included, I technically could but I'm not going to, then we shouldn't get an objection on a rebuttal witness." Without correction or objection by either party, the circuit court said "either they both testify or neither of them do." The prosecutor responded: "Well, then, they'll both testify."

¶18 Postconviction, Dancel asserted that trial counsel performed deficiently by failing to request the alternative—that neither witness be allowed to testify. At the ***Machner*** hearing, trial counsel testified that he made a tactical decision not to object to the victim testifying even though the prosecution omitted her from its original witness list. He considered it an "offset" that would allow the defense to call Delatorre as a witness, even though her name was not on the defendant's witness list. Trial counsel did not think the circuit court would exclude the victim's testimony: "There was no way that the judge was not going to permit the victim to testify." He further believed that if the circuit court did exclude her testimony, the State would simply dismiss and reissue the charges. *See* ***State v. Miller***, 2004 WI App 117, ¶10, 274 Wis. 2d 471, 683 N.W.2d 485 (the discovery statutes do not prevent the State from dismissing and refiling charges in response to the exclusion of evidence based on a statutory discovery violation).

He explained that Dancel wanted the case completed and "getting the matter dismissed voluntarily by the State would not accomplish that."

¶19 We conclude that trial counsel's performance was objectively reasonable. As counsel explained, he did not think the circuit court would ultimately disallow the victim's testimony and he wanted to secure Delatorre's ability to testify. Citing to ***State v. Prieto***, 2016 WI App 15, 366 Wis. 2d 794, 876 N.W.2d 154 (2015), Dancel treats as a foregone conclusion that upon request, the circuit court would have barred the victim's testimony. In ***Prieto***, we upheld the circuit court's discretionary decision to sanction the prosecution's failure to comply with the discovery statute and/or the court's scheduling order by excluding the prosecution's witnesses. ***Id.***, ¶¶3-4, 11, 16.

¶20 ***Prieto*** is procedurally, factually, and legally distinct, and we decline to assume that the circuit court in the instant case would have ultimately prohibited the named child victim from testifying. In addition to the rights afforded crime victims in Wisconsin, *see* WIS. CONST. art. I, § 9m, Dancel could hardly claim surprise. Further, ***Prieto*** involved the prosecution's complete failure to file the witness list required by statute until after the court had granted the defendant's motion to exclude. ***Prieto***, 366 Wis. 2d 794, ¶¶6-7. Here, parties both provided witness lists well in advance of trial. While ***Prieto*** reminds litigants that parties ignore discovery statutes and pretrial scheduling orders at their own peril, that did not happen here. Viewed in context at the time of his decision, trial counsel's conduct was objectively reasonable, especially given Dancel's expressed desire to avoid the further delay that would inevitably result from the dismissal and refiling of charges.

By the Court.—Judgment and order affirmed.

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