COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2275-CR **Cir. Ct. No. 2013CF864**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAURICE D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN and MARK A. SANDERS, Judges. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Maurice D. Johnson appeals a judgment convicting him of first-degree sexual assault of a child, strangulation and suffocation, and two counts of child abuse, and an order denying his postconviction motion claiming that trial counsel provided ineffective assistance.[1] Johnson argues that the circuit court erred in determining that Johnson could not present evidence of a claimed prior untruthful sexual assault allegation made by one of the victims, and in concluding that trial counsel's failure to object to alleged hearsay offered by the State was ineffective. We disagree and affirm.

¶2 Johnson was charged with sexually assaulting and physically abusing his stepdaughter, J.A.L., and with strangling and physically abusing another stepdaughter. Johnson filed pretrial motions seeking preliminary rulings on the admissibility of other acts evidence. First, he sought to introduce evidence that J.A.L had previously accused her biological father of physical abuse and had recanted those allegations. The circuit court ruled that Johnson could introduce evidence pertaining to the truthfulness of J.A.L.'s prior physical abuse allegations.

¶3 Second, Johnson filed a pretrial motion seeking to introduce evidence that J.A.L. had falsely accused Johnson's uncle, E.J., of sexual assault. According to the motion, E.J. would testify that at the time police were investigating Johnson, they advised E.J. "that [J.A.L.] told them he had sexually

[1] The Honorable Stephanie Rothstein presided at Johnson's jury trial and sentencing hearing and entered the judgment of conviction. The Honorable Mark A. Sanders entered the order denying Johnson's postconviction motion.

contacted her as well." The motion asserted that E.J. "denied any such conduct and maintained it was a false allegation against him."[2]

¶4 At the pretrial motion hearing, the prosecutor explained that the decision not to charge E.J. "had nothing to do with [a] false allegation or any indication in the reports that the allegation was not in fact truthful," but was instead attributable to proof problems brought on by an uncooperative witness, namely, defendant Johnson's mother. The prosecutor confirmed that the investigator "found the victim to be reliable" and that J.A.L. had not recanted the allegation. The prosecutor presented to the court sealed police reports prepared as part of the investigation into J.A.L.'s allegations against E.J.

¶5 The circuit court denied Johnson's motion to introduce evidence of J.A.L's allegedly false accusation against E.J. The court determined that based on the lack of reliable evidence, it could not conclude that a jury "could reasonably find that it's more likely than not that" J.A.L. made a prior untruthful allegation against E.J., and further, "that it would lead the jury astray about what they should arguably be deciding."

¶6 The matter proceeded to trial and Johnson was convicted of all four charges. The circuit court imposed an aggregate bifurcated sentence totaling fifty-one years, with thirty-seven years of initial confinement.

¶7 Johnson filed a postconviction motion alleging in pertinent part that trial counsel was ineffective for failing to object to the admission of hearsay

[2] The motion also asserted that E.J.'s sister, who is also defendant Johnson's mother, would support E.J.'s denial.

evidence. The circuit court denied the motion by memorandum decision, without an evidentiary hearing. Johnson appeals.

The circuit court properly exercised its discretion declining to admit evidence that the victim falsely accused E.J. of sexual assault.

¶8 Johnson contends that the circuit court erroneously exercised its discretion in excluding the proffered testimony of E.J. that J.A.L. had falsely accused him of sexual assault. The decision whether to admit evidence is subject to the circuit court's discretion, and we afford its decision great deference. ***State v. Jackson***, 2014 WI 4, ¶¶43, 45, 352 Wis. 2d 249, 841 N.W.2d 791. "A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." ***Id.***, ¶43 (citation omitted).

¶9 Evidence of a victim's sexual history is generally not admissible under WIS. STAT. § 972.11(2)(b), Wisconsin's rape shield law. One exception to the rape shield law is evidence of a victim's prior untruthful allegation of sexual assault. Sec. 972.11(2)(b)(3); ***State v. Ringer***, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448. To satisfy this exception, the proponent must prove that the prior allegation was in fact "untruthful," that it is material to a fact in issue, and that its probative impact outweighs its inflammatory and prejudicial impact. ***Ringer***, 326 Wis. 2d 351, ¶27. A defendant may introduce evidence of the complainant's alleged prior untruthful allegations of sexual assault "only after close judicial scrutiny." ***Id.***, ¶26 (citing ***State v. DeSantis***, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990)). The evidence is not admissible unless the circuit court concludes that "a jury, acting reasonably, could find that it is more likely than not

that the complainant made prior untruthful allegations of sexual assault." ***Ringer***, 326 Wis. 2d 351, ¶32.

¶10 We conclude that the circuit court properly exercised its discretion in excluding evidence of J.A.L.'s allegedly untruthful accusations against E.J. The circuit court explicitly applied the correct legal standard to the facts of record and explained its reasonable result. As the court observed, it was effectively being asked to make a determination that J.A.L. lied based on the "say-so" of E.J. ***Id.***, ¶39 (stating that the alleged assailant's "denial alone" was insufficient to support a jury's finding that the victim's allegations were untruthful). Given the nature of this self-serving, unverifiable testimony, the court was understandably concerned that Johnson offered no "independent corroboration" that J.A.L.'s accusation was false, for example, a recantation by J.A.L. ***Id.***, ¶37 (the fact that the victim "never recanted her allegations weighs against a jury's finding that the allegations were untruthful"). Along these lines and as in ***Ringer***, because "[a]t most" Johnson's proffer showed that "there were competing versions of what occurred," the circuit court reasonably determined that allowing E.J.'s testimony would impermissibly require the jury to speculate about J.A.L.'s truthfulness and invite a trial within a trial. ***Id.***, ¶41 (testimony concerning allegedly false prior allegation not admissible where it "could result in a trial within a trial, confuse the issues as they relate to [the defendant's] case, and invite the jury to speculate concerning [the victim's] truthfulness and whether the prior sexual assault occurred").[3]

[3] The circuit court stated the risk that the evidence would confuse and mislead the jury was exacerbated by the particular facts of this case, and observed the strategy could "backfire" on Johnson if the jury did not believe E.J. and found that J.A.L. was victimized by several family members who were covering up for each other. Relevant to this consideration is that J.A.L.'s mother was criminally charged and convicted in connection with this case.

¶11 To the extent Johnson suggests that the circuit court improperly considered the prosecutor's reasons for not bringing charges against E.J., we disagree. Aside from the fact that ***Ringer*** explicitly approves this consideration, the defendant has the burden to produce facts from which a reasonable jury could find it more likely than not that the complainant made prior false allegations of sexual assault. *See* ***id.***, ¶¶29-32, 36. With the defendant's burden in mind, the circuit court determined that the lack of criminal charges against E.J. did not help Johnson because "the district attorney is not required to prosecute all cases, including those in which it appears that the law has been violated." ***Id.***, ¶40. "A district attorney's discretionary belief that she cannot prove certain allegations beyond a reasonable doubt does not conclusively support a determination that the complainant's allegations were untruthful." ***Id.*** The reasons for not prosecuting E.J. are relevant insofar as they do not provide support for a finding that J.A.L. made an untruthful allegation.

¶12 We also reject the notion that the circuit court suggested that in order for E.J.'s testimony to be admissible, there would have to be some evidence that investigating officers thought J.A.L. had lied or they did not believe her story. This misconstrues the circuit court's rationale. Like its reference to the prosecutor's charging decision, the circuit court mentioned the results of the investigation to explain that Johnson had not met his burden of production and to support its determination that a jury could not reasonably find it was more likely than not that J.A.L. lied. The circuit court was illustrating that at bottom, Johnson's proffer was based on unreliable self-serving testimony.

Trial counsel did not provide ineffective assistance by failing to object to alleged hearsay evidence.

¶13 At trial, J.A.L.'s grade school teacher testified that nine days after the assault, J.A.L. told her she needed to talk to her about something. The teacher was busy at the time and asked J.A.L. to write down her concerns on a piece of paper. The teacher read the note to the jury:

> I got raped. My dad, I got raped by my dad and a whipping, too. And if you look at my behind, it got cuts and scratches on it. Please don't tell on me because I'm going to get the same thing and he said that he's going to do it when my mom is gone. So please don't tell on me and don't tell them that I said this to you.

¶14 The teacher testified that J.A.L. then told her that while her mother was at work, Johnson, whom she calls "dad," bent her over a freezer chest and had sex with her. The teacher contacted the school social worker and J.A.L.'s mother was informed. Shortly thereafter, J.A.L.'s mother along with Johnson retrieved J.A.L. from school under the pretense of a medical appointment. There was no such appointment.

¶15 Later that day, officers picked up J.A.L. from her mother's home and transported her to a physical examination. Her body revealed extensive bruising, both old and new, consistent with being hit by a belt. During a forensic interview, J.A.L. recanted her accusations, but when the officer left the room, J.A.L. whispered:

> He did this to me. I'm just not gonna say it in front of my mama's face. He told me to go in the kitchen and he started to bend me over the deep freezer. I was crying. I was screaming. So y'all that's the whole truth. I'm just not gonna say it in front of my mama's face. He told me to make something like this up.

¶16 The next day an officer listened to the interview and heard J.A.L.'s whispered statements. This prompted a second forensic interview. This time, J.A.L. described how Johnson beat and sexually assaulted her. At trial, J.A.L. testified that she told the truth at the second interview, which took place after she was removed from the home she shared with her mother and Johnson. She described in graphic detail the sexual assaults perpetrated by Johnson over a kitchen freezer and moments later in his bedroom while her mother was at a Super Bowl party.

¶17 Johnson filed a postconviction motion alleging that his attorney was ineffective for failing to object on hearsay grounds to the admission of the teacher's testimony concerning JAL's note and oral description of what Johnson did to her. The circuit court denied the motion in a written decision without an evidentiary hearing. The court determined that trial counsel's conduct was not deficient because the circuit court would have overruled a hearsay objection. Specifically, the circuit court ruled that the hearsay testimony was admissible under the more liberal application of the excited utterance exception in child sexual assault cases. The court also concluded that Johnson could not show prejudice because the statements were not hearsay,[4] and because in light of the strong evidence of Johnson's guilt, there was no reasonable probability that the teacher's testimony affected the outcome of the trial.

¶18 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient

[4] The circuit court determined that the statements were not hearsay either because they were prior consistent statements under WIS. STAT. § 908.01(4)(a)2., or because they were not offered for the truth of the matter asserted, *see* § 908.01(3).

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. To prove constitutional prejudice, the defendant must show that but for counsel's 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.

¶19 A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. ***Id.***

¶20 We conclude that the circuit court properly denied Johnson's postconviction motion without a hearing. The circuit court properly determined that J.A.L.'s statements to her teacher were not hearsay and were admissible as prior consistent statements "to rebut an express or implied charge against [J.A.L.] of recent fabrication or improper influence or motive." WIS. STAT. § 908.01(4)(a)2. Johnson's cross-examination of the forensic interviewer and of J.A.L. implied that J.A.L. had been improperly influenced by unknown sources to fabricate her second (i.e., postrecantation) statement affirming the abuse. Counsel is not deficient for failing to lodge a meritless objection. *See, e.g.*, ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110.

¶21 In the alternative, even if the teacher's testimony were hearsay, counsel was not ineffective because the circuit court would have overruled a hearsay objection and admitted the evidence as an excited utterance. *See* ***id.***, ¶21; ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal issue later determined to be without merit is neither deficient). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." WIS. STAT. § 908.03(2). Spontaneity and stress are the circumstances which endow excited utterances with sufficient trustworthiness to render them admissible. ***State v. Huntington***, 216 Wis. 2d 671, 681-82, 575 N.W.2d 268 (1998). In cases involving child sexual assault, the exited utterance exception is liberally construed to allow into evidence as "sufficiently contemporaneous and spontaneous" statements that do not immediately follow the incident. ***Id.*** at 682. This liberal construction acknowledges a young victim's "inability or refusal to verbally express [herself] in court when the child and the perpetrator are sole witnesses to the crime." ***Id.***

¶22 We agree that J.A.L.'s note and statement to her teacher qualifies as an excited utterance. A court could reasonably determine that J.A.L. was still under the stress of the crime when she reported it to her teacher. ***Id.*** at 684. In ***Huntington***, the court upheld the admissibility of an excited utterance by a ten-year-old child to her mother and sister two weeks after the last incident and to a police officer shortly after that. ***Id.*** at 683-85. Here, J.A.L. was only eight years old when the sexual assault occurred and she told her teacher nine days later. In the interim, she was still living with Johnson and her unsupportive mother. She told the first person she could trust, her teacher, who testified that J.A.L. appeared "worried" and "upset," which was not normal for J.A.L. The very tone of her

letter supports that J.A.L. was still under the stress of the incident. Under ***Huntington***'s liberal construction, J.A.L.'s statements were "sufficiently contemporaneous and spontaneous" to satisfy the excited utterance hearsay exception. ***Id.*** at 682.

By the Court.—Judgment and order affirmed.

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