COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP606-CR **Cir. Ct. No. 2002CF430**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK B. HODGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mark Hodge appeals a judgment convicting him of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1).[1] Hodge also appeals the order denying his motion for postconviction relief. Hodge argues the trial court erroneously exercised its discretion by permitting evidence of the child's character for truthfulness. Hodge also contends his trial counsel was ineffective for failing to provide evidence of the child's poor character for truthfulness. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 In November 2002, the State charged Hodge with repeated sexual assault of a child. The charges arose from allegations that Hodge had assaulted his step-granddaughter, Tiama B., on at least four occasions during weekend visits to Hodge's home. After a jury trial, Hodge was convicted of the crime charged and sentenced to eight years' initial confinement followed by seventeen years' extended supervision. Hodge's postconviction motion for a new trial was denied, and this appeal follows.

DISCUSSION

A. Admission of Rehabilitative Evidence

¶3 Hodge argues the trial court erroneously exercised its discretion by permitting evidence of the child's character for truthfulness. Specifically, Hodge challenges testimony elicited by the prosecutor during direct examination of Tiama's school counselor, Laurie Krutza. The prosecutor asked Krutza: "Based

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

on your interactions with Tiama and your personal observations of her, have you found—have you formed an opinion as to her truthfulness?" The trial court overruled defense counsel's objection and Krutza answered: "I don't have any evidence that she's ever been untruthful to me and/or to her classroom teacher."

¶4 At Hodge's postconviction motion hearing, the trial court concluded that Krutza's testimony was properly admitted as rehabilitative evidence pursuant to WIS. STAT. § 906.08(1), which provides:

> [T]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:
>
> > (a) The evidence may refer only to character for truthfulness or untruthfulness.
> >
> > (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

¶5 A determination of whether a witness's character for truthfulness has been attacked in a manner sufficient to invoke WIS. STAT. § 906.08(1) requires a circuit court to weigh the impact of the proffered character allegations based on their content and the tenor with which they are offered. ***State v. Eugenio***, 219 Wis. 2d 391, 399, 579 N.W.2d 642 (1998). Such inquiries are circumstance dependent. ***Id.*** Because an appellate court "cannot suitably evaluate such factors based on a cold record, a circuit court's decision that a witness's character for truthfulness has been attacked is due the deference that this court normally awards evidentiary rulings." ***Id.*** Whether the court properly applied § 906.08(1), however, is a question of law. ***Id.***

¶6 Here, Krutza's testimony was elicited after the following exchanges with Tiama on both direct and cross-examination. On direct examination of Tiama, the prosecutor asked whether she knew the difference between a truth and a lie. Tiama defined telling the truth as "telling a real thing" and telling a lie as "telling a wrong thing." When asked what happened if she told a lie, Tiama responded "I get grounded." On cross-examination, defense counsel asked Tiama: "You testified one of the first things you said when you started to testify was that you knew all about the difference between the truth and telling lies?" Tiama responded affirmatively. Defense counsel then confirmed: "You said that when you tell lies you get grounded?" Tiama again responded affirmatively. Defense counsel then asked: "Have you ever been grounded?" Tiama answered, "Yeah."

¶7 The trial court concluded that as a result of this exchange, "the proposition [was] put forward to the jury that [Tiama] has lied in the past," thus attacking Tiama's character for truthfulness under the "otherwise" category of WIS. STAT. § 906.08(1)(b). Hodge nevertheless argues that his inquiry regarding whether Tiama had ever been grounded did not constitute an attack on her character for truthfulness. We are not persuaded.

¶8 Hodge claims that his questions did not specifically ask Tiama whether she had lied in the past or whether she had been punished for lying. Rather, Hodge suggests that counsel was simply attempting to ascertain the victim's experience with being grounded and whether grounding would prevent her from lying. In context, however, a reasonable person could interpret counsel's inquiry to be whether the victim had been punished for lying in the past. To the extent Hodge argues that counsel's inquiry did not infer that Tiama was a liar in general, a reasonable interpretation of counsel's questions, in context, does not necessarily limit Tiama's answer to a single instance of lying in the past. Because

counsel's inquiry constituted an attack on Tiama's character for truthfulness, the trial court properly admitted Krutza's testimony as rehabilitative evidence pursuant to WIS. STAT. § 906.08(1).

B. Ineffective Assistance of Trial Counsel

¶9 Hodge contends trial counsel was ineffective for failing to provide evidence of the child's poor character for truthfulness. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶10 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

¶11 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.*** at 687. 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). In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶12 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694.

¶13 Here, Hodge argues counsel was ineffective for failing to counter Krutza's "good character" testimony with testimony of Tiama's "poor character" for truthfulness. Hodge claims Tiama's poor character for truthfulness could have been established through testimony from Tiama's mother, aunt and grandmother. Hodge acknowledges that his trial counsel had strategic reasons for deciding not to question these witnesses about Tiama's poor character for truthfulness. Hodge nevertheless contends that counsel's strategy was objectively unreasonable. We disagree.

¶14 At the ***Machner***[2] hearing, counsel testified that he chose not to question Tiama's family about her character for truthfulness because he believed it would offend the jury and accentuate Krutza's minimal testimony regarding Tiama's character for truthfulness. Counsel stated:

> [T]here was some brief reference to—by the school personnel that she was—she had a character for truthfulness, but that was really the only reference that I can recall.
>
> It seems to me that by bringing in family members who would attack her character for truthfulness, we probably would have been accentuating the testimony that the jury had already heard that we were trying to rebut, and I'm not quite sure how a jury would have reacted to the family members attacking the little girl.

Trial counsel further indicated that his defense strategy was to attack Tiama's credibility by focusing on the numerous inconsistencies in her statements rather than presenting evidence of her poor character for truthfulness. Counsel explained at the ***Machner*** hearing:

> It seems to me that if we had brought witnesses to testify only to the fact that she's known to be untruthful, we probably would have been opening the door for some other witnesses to be coming in on rebuttal and I don't think that's really what we wanted to do.

¶15 Defense counsel believed that family testimony attacking Tiama's character for truthfulness would offend the jury, undermine the defense strategy and accentuate Krutza's minimal testimony. Because counsel's strategy was reasonable, the trial court properly concluded that counsel's performance was not deficient.

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[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

By the Court.—Judgment and order affirmed.

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